IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No.....

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL.,

Appellants,

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL.,

Appellees.

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Dated at Toledo, Ohio, November 19, 1942.

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IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10844

United Transport Service Employees of America, in its own right, and as the actual and legally designated representative of the "Red Cap" Employees of the Saint Paul Union Depot Company, Saint Paul, Minnesota, 3451 Michigan Ave., Chicago, Ill.; John R. Lawrence, Jr., 947 Inglehart Avenue, Saint Paul, Minnesota; W. A. Young, 841 St. Anthony Avenue, Saint Paul, Minnesota; W. M Bowen, 382 North Avon Street, Saint Paul, Minnesota; L. A. Guinn, 309 North Chatsworth Street, Saint Paul, Minnesota; I. M. Dorsey, 795 Rondo Avenue, Saint Paul, Minnesota,
Plaintiffs.

vs.

National Mediation Board, George A. Cook, Chairman; Otto S. Beyer, David J. Lewis, National Mediation Board Members,
Defendants.

F St. Between 18th and 19 Sts. N. W.

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, individually and as Grand President of the Brotherhood of Steamship Clerks, Freight Handlers, Express and Station Employees,
Intervening Defendants.

Record pages

Address: Brotherhood Railway Clerks Bldg., Cincinnati, Ohio.

COMPLAINT FOR INJUNCTIVE RELIEF

Page 1.

The Bill of Complaint of the plaintiffs respectively shows to the court that:

1. The jurisdiction of this court lies in the expressed terms of the Railway Labor Act, approved May 20, 1926, and amended June 21, 1934, and the inherent jurisdiction of this court to try causes of action seeking injunctive relief against a Federal Administrative body.

2(a). The plaintiff, United Transport Service Employees of America, is a voluntary unincorporated association, having its principal offices in the City of Chicago, State of Illinois. It is a labor union, composed of "Red-cap" employees of various railroads and terminal stations throughout the United States. It is the actual and legally designated and selected representative of the "Red-cap" employees of various railroad companies and terminal stations throughout the United States, and brings this suit as the actual and legally designated and selected representative of the craft, or class, of employees of the Saint Paul Union Depot Company, known and described as "Red-caps."

As representative of the said "Red-caps" in the employ of the said Saint Paul Union Depot Company, the United Transport Service Employees of America brings this suit on behalf of itself and the individuals whom it represents as a class. Said "Red-cap" employees of said Depot Company in actuality serve as Red-caps and are subject to its continuing authority to supervise and direct the manner of rendition of their services, numbering approximately forty-five (45). Said employees of said Saint Paul Union Depot Company represented by the United Transport Employees of America are so numerous that it is impractical to make all of them parties by name and to bring all of them before this Honorable Court by name. All of the persons in behalf of whom this suit is brought are in the same general craft or class of employ, and form a general class or craft of persons. The United Transport Service Employees of America fairly represents the rights and interests of those in whose behalf this suit is brought. The plaintiff, the United Transport Service Employees of America, will hereinafter be referred to as "The United" for the sake of convenience.

2(b). The plaintiff, John R. Lawrence, Jr., is a citizen of the United States and a resident of the city of Saint Paul, State of Minnesota, and brings this suit in his own behalf. He is now employed by the Saint Paul Union Depot Company as a "Red-cap" and is a member of the

craft or class on whose behalf the plaintiff, "The United" brings this suit.

2(c). The plaintiff, W. A. Young, is a citizen of the United States and a resident of the city of Saint Paul, State of Minnesota, and brings this suit in his own behalf. He is now employed by the Saint Paul Union Depot Company as a "Red-cap" and is a member of the craft or class on whose behalf the plaintiff, "The United," brings this suit.

2(d). The plaintiff, W. M. Bowen, is a citizen of the United States and a resident of the City of Saint Paul, State of Minnesota, and brings this suit in his own behalf. He is now employed by the Saint Paul Union Depot Company as a "Red-cap" and is a member of the craft or class on whose behalf the plaintiff, "The United" brings this suit.

2(e). The plaintiff, L. A. Guinn, is a citizen of the United States and a resident of the City of Saint Paul, State of Minnesota, and brings this suit in his own behalf. He is now employed by the Saint Paul Union Depot Company as a "Red-cap" and is a member of the craft or class on whose behalf the plaintiff, "The United," brings this suit.

2(f). The plaintiff, I. M. Dorsey, is a citizen of the United States and a resident of the City of Saint Paul, State of Minnesota, and brings this suit in his own behalf. He is now employed by the Saint Paul Union Depot Company as a "Red-cap" and is a member of the craft or class on whose behalf the plaintiff, "The United," brings this suit.

2(g). The plaintiffs, having a common and general interest in the subject matter of this suit, bring this suit on behalf of themselves and all others who may be similarly situated or who have a similar interest in the subject matter of this suit, and who may desire to join in this action.

3(a). The defendant, the National Mediation Board, is an administrative agent of the United States Government, created by the Act of Congress, approved June 21, 1934, and has its principal office in the District of Columbia. Said National Mediation Board is vested with said au-

thority and charged with said duties, under and by virtue of said Act of Congress, all of which more particularly appears hereinafter.

3(b). Defendant George A. Cook is a citizen of the United States and a resident of the District of Columbia. He is a member and Chairman of the National Mediation Board, and is sued herein as such member of said National Mediation Board.

3(c). Defendant Otto S. Beyer is a citizen of the United States and a resident of the District of Columbia. He is a member of the National Mediation Board, and is sued herein as such member of said National Mediation Board.

3(d). Defendant David J. Lewis is a citizen of the United States and a resident of the District of Columbia, and is sued herein as such member of said National Mediation Board.

4. As more particularly appears hereinafter, the plaintiffs allege that the defendant, the National Mediation Board, by assuming power and authority not vested in it by the said Act of Congress, approved June 21, 1934, hereinafter referred to, and by arbitrary and capricious action, has deprived a large number of "Red-cap" employees of the Saint Paul Union Depot Company of their right to have a voice in the selection of a representative for collective bargaining purposes for the craft or class of employees to which they belong.

The plaintiffs also urge that the act and actions of said National Mediation Board herein complained of are not only arbitrary, capricious and unlawful under the terms of said Act of Congress, but they do not meet the requirements of due process of law and violate the rights of plaintiffs guaranteed to them by the Constitution of the United States.

5. Plaintiffs set forth that as of to-wit, April 25, 1939, an original request was made by the "Red-cap" personnel of the Saint Paul Union Depot Company in the capacity as a local chapter of the plaintiff association, said local chapter being chartered on to-wit: February 25, 1938, of the General Superintendent of the Saint Paul Union Depot Company for the execution of a working and wage agree-

ment between the said "Red-caps" and the Saint Paul Union Depot Company.

To this request a response was first made that a conference looking toward such an agreement could not then be had because of the unsettled status of the "Red-caps" as coming within the terms "employee" under the Railway Labor Act.

When this difficulty had been removed by the specific pronouncement of the Interstate Commerce Commission, the position was then taken by the Saint Paul Union Depot Company that the rights of the "Red-caps" were covered by a previously executed working agreement with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees in alleged accordance with the provisions of the amended Railway Labor Act.

The fact was, and is, that the said agreement referred to, entered into on to-wit July 1, 1921, and revised August, 1924, between the Saint Paul Union Depot Company and employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, indicated in its terms the employees affected, reciting as follows:

> "Rule 1. Employees Affected. These rules shall govern the hours of service and the working conditions of the following employees, subject to the exception noted below, and will supersede all previous schedules, agreements, practices and working conditions:
>
> (1) Clerks.
> (2) Other office and station employees, such as office boys, messengers, chore boys, and operators of office equipment and devices.
> (3) Train announcers, information clerks, gatemen, platform men, checkers, baggage, mail and parcel room employees, milk and railroad supply house employees, truck watchmen, and railroad mail sorters.
> (4) Telephone switchboard operators and elevator operators.
> (5) Laborers employed in and around station and warehouses."

Not only were the "Red-caps" excluded, as this phraseology indicates, but they were not in any wise covered, nor contemplated as being covered, and was further shown, as hereinbefore indicated, by the position of the General Superintendent of the Saint Paul Union Depot Company, party to the said agreement, as first taken to the effect that as late as 1938 he considered the "Red-cap" status as employees as questionable; specifically evidencing that they could not have been in contemplation as a part of the previously executed employees' agreement.

Believing themselves entitled in accordance with the terms of the Railway Labor Act as amended to a bargaining agent of their own choosing, and having indicated "The United," plaintiff herein, as their choice, but recognition being refused by the Saint Paul Union Depot Company, the plaintiffs, as of to-wit February 3, 1939, as provided for in the said Railway Labor Act, invoked the services of the National Mediation Board (said plaintiff association, being then known as the International Brotherhood of Red Caps), to investigate the dispute over said representation.

Said National Mediation Board, pursuant to this invocation, assigned a mediator to make a preliminary investigation, and upon same being made, the said National Mediation Board took the position of allowing the plaintiffs, "The United," to withdraw its request upon the pretended finding that the individual employees in question were not a separate craft or class for representation purposes within the meaning of the Railway Labor Act.

"The United," however, insisted that a formal hearing be held and for the apparent additional reason that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees (hereinafter referred to as "The Brotherhood") also indicated its desire for a hearing to determine the issues raised by the foregoing positions of "The United" and "The Brotherhood," the National Mediation Board docketed the matter for hearing.

In keeping with this arrangement, on to-wit May 6, 1940, in Case No. R-635 of the National Mediation Board's

files, a hearing was accordingly had and testimony taken in Washington, D. C., before the National Mediation Board, with the Chairman of said parties, "The United" and "The Brotherhood," an exchange of briefs was authorized and briefs on both sides were subsequently filed.

The admitted issue as developed by the testimony and as argued in the briefs involved the question as to whether or not the employees referred to constituted a separate craft or class for representative purposes within the meaning of the Railway Labor Act or whether they were a part of the craft or class of clerical, office, station and storehouse employees.

The pertinent evidence offered showed that at the time of the investigation there were to-wit forty-five (45) men involved, all of whom are Negroes and who were designated on the payroll of the Company as station porters. The manner in which the hours of service of the various employees were used up was covered in the evidence in much detail. It need not be here set forth, except to indicate that the testimony was conflicting as to the time given by the representative men to other than "Red-cap" duties; that is, duties other than the assisting of incoming and outgoing train passengers with their hand-baggage and the like; and as having to do with the performing of such work around the station as might be classed as janitor or custodial service.

The testimony developed that all of the employees, the said "Red-caps" work on an hourly basis—there being three different rates of pay, depending on the kind of service rendered. Plaintiffs here aver that the testimony adduced before the said Mediation Board, defendant herein, revealed that in all instances the preponderance of the work done by the said "Red-caps" was devoted to "Red-cap" service, and on this point at least, the defendant National Mediation Board, in its finding, supported that position although the "Brotherhood" offered testimony tending to show that the average preponderance of the work was in the janitorial or custodial field and although the Saint Paul Depot Company took the position that the division of time was about equal between the two types of duties.

The testimony further disclosed, and without contradiction, that the said "Red-caps" were recognized for seniority purposes as a separate class or craft.

After the taking of said testimony by the said National Mediation Board and the perusal of briefs submitted, the National Mediation Board handed down a written, detailed finding dismissing the invocation of the plaintiff association, which said finding as to the decisive phraseology was concluded in the following language:

> "Based upon the record it is the conclusion of the National Mediation Board that the station porters employed by the Saint Paul Union Depot Company are part of the craft or class of clerical, office, station and storehouse employees and not a separate craft or class for the purposes of the Railway Labor Act. No dispute over representation has been found by the Board to exist among the craft or class of clerical, office, station and storehouse employees in the service of the Company. For these reasons the Board dismisses the application of the United Transport Service Employees of America."

Being remediless except by the intervention of this Honorable Court as provided for against the injustices occasioned by this action of the defendant, the National Mediation Board, the redress herein prayed for is sought by the plaintiffs.

6. In this regard it is respectively submitted that the National Mediation Board was in error in its finding and the said decision was in the teeth of and contrary to previous decisions rendered by the said defendant, the National Mediation Board. The plaintiffs submit that the said dismissal of the invocation was not justified under the testimony offered, the precedent cited and the briefs filed, which showed that the National Mediation Board had recognized this very plaintiff, "The United" as the bargaining agent in other cases for "Red caps" as a distinctly separate craft or class.

Plaintiffs further submit that the testimony taken before the said National Mediation Board disclosed that at

no time have the "Red-caps" in question been represented by "The Brotherhood," which neither holds "Red-caps" designations, nor admits them to membership. Plaintiffs do submit that the dismissal of the invocation by the National Mediation Board is a violation of the law laid down in the Railway Labor Act that amounts to a denial to the individuals in question of a voice in collective bargaining, making them, against their will and desire, a part of a craft or class in which they must of necessity always be a hopeless and voiceless minority, and requiring that expressly against their will they should be represented by "The Brotherhood" in which membership is denied to them, thus effectively leaving them without representation of any kind or character, on the theory announced by the National Mediation Board that they are a part of a craft or class which not only specifically omits them in its "scope" as outlined in its executed agreement, but in which they are denied representation and franchise.

Plaintiffs aver that the constitutional rights of the plaintiffs in question are violated by the action of the National Mediation Board as herein outlined and specifically, but without limiting the foregoing, the rights as assured them under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs submit that the decision of dismissal of the National Mediation Board was and is a violation of the property rights of the individuals named as plaintiffs, and thus for whom the plaintiffs appear in a representative capacity. Plaintiffs submit that the dismissal by the National Mediation Board of Case No. R-635, the case hereinbefore referred to, and made the basis of this action, by the National Mediation Board, defendant herein, was contrary to the evidence adduced, contrary to the law in such case made and provided, contrary to the terms of the Railway Labor Act and to the law governing the Railroad industries, and in violation of the rights of the individual employees of the Saint Paul Union Depot Company "Red-caps" hereinbefore referred to and made parties plaintiff, the defendant, the National Mediation Board, and the individual members of the said Board named as parties

defendant, to appear herein and answer the exigencies of this complaint.

2. That a rule to show cause issue herein requiring the defendants and each of them to show cause, if any they have, why the order of dismissal of Case No. R-635 of the files of the National Mediation Board should not be nullified and declared to be void, and why "The United," plaintiff herein, should not be certified by the said National Mediation Board as the bargaining agent for the "Red-caps" at the Saint Paul Union Depot Company in keeping with the unanimous invocation by the said "Red-caps."

3. That an order of Court be passed herein, declaring the conclusion of law in said Case No. R-635 to be without legal effect and requiring the National Mediation Board to restore the invocation of "The United" and requiring the said National Mediation Board to declare such a dispute to exist as to justify the intervention of the National Mediation Board.

4. That an order go out from this Honorable Court declaring the "Red-caps" herein referred to to be a separate craft or class and entitled to be represented under the terms of the Railway Labor Act and directing the National Mediation Board to take steps based upon the "Red-caps'" request for the plaintiff association to represent them not inconsistent with such holdings: and to accomplish all of the prayers of this complaint by such injunctions and/or mandatory orders as may be necessary to effectively carry out the holdings of this court as here sought.

5. For such other and further relief as the nature of the case may require, and to this Honorable Court may seem just and proper.

Cobb, Howard and Hayes
By George E. C. Hayes
Attorneys for Plaintiffs,
613 F Street, N. W.
Washington, D. C.

Leon M. Despres,
100 West Monroe St., Chicago, Ill.
Cobbs, Howard & Hayes,
613 F St., N. W.
Na. 2702.

ANSWER

Come now the defendants and for answer to the complaint in this case respectfully state:

1.

Paragraph 1 of the complaint contains conclusions of law which defendants are not required to answer.

2(A)

Defendants admit the allegations in the first paragraph of Paragraph 2(A) of the complaint, except that they deny that the plaintiff, United Transport Service Employees of America (hereinafter referred to as "Association") is the actual and legally designated and selected representative of a craft or class of employees of the St. Paul Union Depot Company known and described as red-caps. Defendants admit that the plaintiff association brings the suit on behalf of itself and individuals whom it claims to represent, that the employees of the Depot Company are subject to its continuing authority to supervise and direct the manner of rendition of their services and number approximately forty-five, and that it would be impractical to make all of the persons claimed to be represented by the plaintiff association parties by name. Defendants deny the remaining allegations in the second paragraph of Paragraph (A).

2(B)-2(G)

Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 2(B)-2(G) of the complaint.

3.

Defendants admit the allegations contained in Paragraph 3(A)-3(D) of the complaint.

4.

Defendants deny the allegations contained in Paragraph 4 of the complaint.

5.

(a) For answer to the first paragraph of Paragraph 5 of the complaint defendants admit that on or about April

25, 1938, the plaintiff association, purporting to act as representative of the red-cap personnel, requested a conference with the general superintendent of the St. Paul Union Depot Company. Defendants deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the said paragraph.

(b) For answer to the second paragraph of Paragraph 5 of the complaint defendants admit that the superintendent of the carrier stated that the status of red-caps under the Railway Labor Act was being determined by the Interstate Commerce Commission; defendants deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the said paragraph.

(c) Defendants admit the allegations contained in the third paragraph of Paragraph 5 of the complaint.

(d) For answer to the fourth paragraph of Paragraph 5 of the complaint defendants admit that the agreement referred to contains the language quoted. (2)

(e) Defendants deny the allegations contained in the fifth paragraph of Paragraph 5 of the complaint.

(f) Defendants admit the allegations contained in the sixth paragraph of Paragraph 5 of the complaint, except that they deny knowledge or information sufficient to form a belief as to whether all of the so-called red-cap employees of the St. Paul Depot Company had indicated the plaintiff association as their choice as representative.

(g) For answer to the seventh paragraph of Paragraph 5 of the complaint defendants admit that pursuant to the invocation of their services they assigned a mediator to make a preliminary investigation, and that after such investigation had been made, they wrote the plaintiff association asking if in view of the facts disclosed the plaintiff association would not be agreeable to withdrawing the invocation. Defendants deny the remaining allegations contained in the said paragraph.

(h) Defendants admit the allegations contained in the eighth paragraph of Paragraph 5 of the complaint, and aver that the Mediation Board originally advised the plaintiff association that if it did not care to withdraw its invocation, it would be necessary for the Board to hold a hearing.

(i) Defendants admit the allegations contained in the ninth paragraph of Paragraph 5 of the complaint.

(j) Defendants admit the allegations contained in the tenth paragraph of Paragraph 5 of the complaint.

(k) Defendants admit the allegations contained in the eleventh paragraph of Paragraph 5 of the complaint.

(l) Defendants admit the allegations contained in the twelfth paragraph of Paragraph 5 of the complaint (3).

(m) Defendants deny the allegations contained in the thirteenth paragraph of Paragraph 5 of the complaint.

(n) Defendants admit the allegations contained in the fourteenth paragraph of Paragraph 5 of the complaint.

(o) Defendants deny the allegations contained in the fifteenth paragraph of Paragraph 5 of the complaint.

6.

Defendants deny the allegations contained in the sixth paragraph of the complaint.

Further answering the complaint, defendants aver that:

7.

Pursuant to the invocation of services by plaintiff association they held a hearing and made findings of fact with reference to the question of whether the employees claimed to be represented by plaintiff constituted a separate class or craft within the meaning of the Railway Labor Act, that the findings made are attached to this answer and marked Exhibit A, that these findings are supported by substantial evidence and are not arbitrary or capricious or otherwise contrary to law, and that accordingly said findings and decision are binding upon this court.

Wherefore it is respectfully submitted that the complaint be dismissed with costs to the defendants.

Robert L. Stern,
Special Assistant to the Attorney General, Department of Justice,
Washington, D. C.

Service acknowledged this 29th day of April, 1941.
George E. C. Hayes,
Attorney for plaintiffs, (4)

NATIONAL MEDIATION BOARD EXHIBIT A

In the Matter of
REPRESENTATION OF EMPLOYEES
of the
ST. PAUL UNION DEPOT COMPANY
Station Porters

Case No. R-635

DISMISSAL
November 26, 1940

Under date of February 3, 1939, the services of the National Mediation Board were invoked by the then International Brotherhood of Red Caps, now known as the United Transport Service Employees of America (hereinafter referred to as the "United") to investigate an alleged dispute over representation among certain employees of the St. Paul Union Depot Company (hereinafter referred to as the "Company") designated by the United as "red caps." Preliminary inquiry developed that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees (hereinafter referred to as the "Brotherhood") considered that it already represented these particular employees, that they were covered by an agreement negotiated with the Company by the Brotherhood on behalf of the craft or class of clerical, office, station, and storehouse employees, and that the employees designated by the United as "red caps" did not in fact constitute a separate craft or class for representation purposes within the meaning of the Railway Labor Act but were in reality part of the craft or class of employees already represented by the Brotherhood and covered by the agreement referred to above.

Mr. John F. Murray, Mediator, was assigned to make a preliminary investigation of the claims of the parties to this dispute. The results of his investigation, which was conducted on the ground, were such as to warrant the

Board giving the United an opportunity to withdraw its request from the Board for the reason that the preliminary evidence developed did not appear to sustain its contention that the employees in question were in fact a separate craft or class for representation purposes within the meaning of the Railway Labor Act. The United, however, did not avail itself of the opportunity but instead insisted that a formal hearing be held by the Board to determine the issues which had been raised because of the conflicting claims of the United and the Brotherhood. The Brotherhood had also indicated its desire for a hearing if the facts developed by the preliminary investigation did not warrant the Board to dismiss the case on its own initiative. Accordingly, the Board docketed the case and notified the parties to the dispute that a hearing would be held in Washington, D. C., on May 16, 1940, in order to give all interested parties opportunity to present pertinent data and argument in support of their positions. The hearing, conducted by Mr. O. S. Beyer, then Chairman of the Board, was followed by briefs filed and exchanged by the parties.

Subsequent to the closing of the hearing the United, in filing its brief, attempted to include therewith a confidential statement, based upon its own investigation, respecting the duties of the employees involved. Regarding this submission the Board advised the United, first, that no so-called confidential information could be admitted without giving the Brotherhood opportunity to reply to such information and, second, that it was understood at the conclusion of the hearing that no new evidence would be introduced by either party in its brief.

The United, however, insisted upon consideration by the Board of the new evidence and charged that certain statements had been made during the hearing which were false and misleading. While the Board declined to accept the new evidence proffered by the United, it did advise both organizations that through its own representative in cooperation with the representatives of both the United and the Brotherhood it would make an independent check of the evidence introduced by the parties at the hearing. Mr. T. E. Schoonover, Mediator, was directed to make such an investigation which he did from September 5 to 7, 1940.

His report of investigation, in addition to the original investigation report, the testimony taken at the hearing, and the briefs submitted by the parties all have been taken into consideration by the Board in respect to the issues involved in this case.

THE ISSUE INVOLVED

The issue involved in this case is whether the employees referred to by the United as "red caps" in the service of the Company constitute a separate craft or class for representation purposes within the meaning of the Railway Labor Act, or whether they are part of the craft or class of clerical, office, station and storehouse employees in the service of the Company, and thus would not be entitled to designate representatives separate from those already designated by the craft or class of clerical, office, station and storehouse employees.

FINDINGS OF FACT

Upon the record before it, the National Mediation Board finds as follows:

1. The individuals involved in this dispute are employees of the Company within the meaning of the Railway Labor Act. At the time of the investigation they numbered 45 in all, although the number fluctuates somewhat in the course of the year, depending upon the amount of passenger traffic passing through the depot. All of these employees are colored and are designated on the payrolls of the Company as station porters. They are reported on Interstate Commerce Commission Wage Statistics Form A under Item 87, "Baggage, parcel room, and station attendants." The Company reports to the Commission that it does not employ any individuals designated as "red caps," separate provision for which is made on the Wage Statistics forms.

2. In addition to assisting incoming and outgoing train passengers with their hand baggage and the like, the employees in question perform a multitude of additional tasks, consisting of cleaning windows, dusting benches,

cleaning office space occupied by the Company as well as by its tenants such as the Pullman Company and the Canadian Pacific Railway Company, cleaning away ice and snow and sanding pathways and platforms in the winter, clipping hedges, performing gardening work and trimming lawns in the summer, clearing away trash in driveways, cleaning light fixtures, shining cuspidors, cleaning telephone booths, sweeping the stairs and lobby of the station, mopping the public toilets, polishing brass, cleaning glass, cleaning the ticket and telegraph offices, locker rooms, and drinking fountains, cleaning bowls and supplying towels in the washrooms, performing inter-office messenger service, relieving elevator operators, and stamping and stringing parcel checks. Two of the individuals involved serve as head porters and supervise the work of the balance of the force.

The testimony given at the hearing as to how much time was devoted to custodial and related work other than personal assistance to passengers by these employees varied, depending upon who was doing the testifying. The representative of the United estimated that on the average the employees devoted three hours per day to janitor service and five hours to "red cap" service. The Brotherhood, on the other hand, estimated the division to be a little more than four hours daily in janitor and related service and the balance as "red cap" work. Finally, the representative of the Company estimated the time to be divided equally between custodial duties, on the one hand, and "red cap" or personal service to passengers, on the other.

3. The evidence reveals that some of the employees do much more of the janitor work than others, but all are subject to performing some of this work in addition to their "red cap" duties. Upon the basis of work assignments the employees are divisible into three separate groups. Employees in the first group work eight hours per day and six days per week on regular assignments. It is this group that performs the bulk of the janitor work. There are 28 employees in this group who on the average perform custodial work for three hours per day and for the remaining five hours perform "red cap" service. This applies to all employees in this group except the two head porters whose duties are mainly of a supervisory nature. In Group 2

there are four employees who work 3¾ hours during the evening of the summer months when passenger traffic is heavy. These employees are assigned seven days per week and practically all of their time is devoted to "red cap" service. The only janitor service required of them is about ten or fifteen minutes daily to clean up the lobby and concourse. The employees in Group 3 are assigned from 7:00 A.M. to 9:00 A.M. on what is commonly known as the "morning watch." This shift is kept on the year around, but the number of employees on the shift is varied with the fluctuations in passenger traffic. At the time of the Board's investigation there were 13 employees in this group and of this number 11 were assigned seven days per week whereas the other two worked only on weekends. No janitor service is ordinarily required of these employees, all of their time being devoted to "red cap" service.

In general the employees in Group 1 are the oldest in point of service and thus are able to hold the more lucrative eight hour jobs which are assigned on the basis of seniority. Next in point of service are the employees in Group 2, and of these the ones with the most seniority relieve the Group 1 employees when vacancies occur by layoffs, leaves of absence, sickness, or vacations. Finally, the employees in Group 3 are the youngest in point of service. Here too seniority prevails in assignments, and the employees in this group with the most seniority are permitted to work steadily whereas the younger employees are called only when traffic is heavy or when there are vacancies.

The employees in all three groups are carried on one seniority roster. While only a minor proportion of the time of Group 2 employees is devoted to janitor service, and very little, if any, of the time of those in Group 3, all of these employees are subject to performing some of this work if so instructed. Moreover, as the employees in these two groups accumulate seniority they are assigned to Group 1 positions as vacancies occur.

4. The employees in all three groups work on an hourly basis at the rate of approximately 32 cents per hour. The employees in Group 1 receive $2.59 for an eight-hour day, and the employees in Group 2 receive $1.20 per day

for 3¾ hours of service. The employees in Group 3 receive three hours pay or 97 cents daily for two hours service.

The employees of all three groups have for a substantial period going back as far as 1917, been paid either on a monthly, daily, or hourly basis. They have never, in the performance of either janitor or "red cap" work, been entirely dependent for an income on the gratuities received from passengers for personal service. The evidence shows that prior to General Order No. 27, issued by the U. S. Railroad Administration, the wages of these employees were at the rate of $45.00 per month. General Order No. 27 increased this rate of pay on June 1, 1918, to $65.00 per month. Supplement No. 7 to General Order No. 27 further increased this rate of pay to $70.00 per month, and Decision No. 2 of the U. S. Railroad Labor Board finally raised it to $80.20 per month. Subsequently these rates were reduced, and the basis of pay was changed from monthly to daily. It further appears that the wage deduction and wage restoration arrangements negotiated in 1932 and subsequent thereto between the carriers of the United States as a whole and the labor organizations, representing, among others, the clerical, office, station and storehouse employees, all have been applied without discrimination to the employees in question. This observation also applies to the five cents per hour wage increase agreed upon in mediation on August 5, 1937, in National Mediation Board Case No. A-395.

5. Whenever vacancies have occurred in positions in the ranks of these employees, such vacancies have been bulletined, bids have been secured from employees on the station porters' seniority roster, and assignments have been made to the oldest employees in point of seniority who placed bids, all as provided by the agreement negotiated by the Brotherhood with the Company. It furthermore appears in this connection that disputes arising out of individual grievances or out of the application or interpretation of the Brotherhood's agreement covering these particular employees have been handled by the local spokesmen or general chairman of the Brotherhood with the Company on behalf of the individuals affected. The foregoing is further confirmed by the fact that in keeping with the

terms of the Brotherhood's agreement, the seniority roster covering the employees in question is revised annually and posted for correction as provided for in the Brotherhood's agreement.

6. The testimony reveals that there is no difference of opinion between the Brotherhood and the Company as to whether the Brotherhood's agreement covers the employees in question. The Company testified during the hearing that these employees are covered by the Brotherhood's agreement, that the Company had negotiated in the past with the Brotherhood representative in behalf, among others, of the station porters and is prepared to negotiate in the future on the same basis as in the past.

7. The employees here under consideration first became subject to the provisions of a duly-negotiated labor agreement on January 1, 1920. This agreement was negotiated by the Brotherhood with the U. S. Railroad Administration and covered the clerical, office, station, and storehouse employees in the service of the Company during the period of federal control. Examination of the scope rule of this agreement reveals that, among other things, it applied to laborers employed in and around stations, storehouses, and warehouses, but exempted therefrom were individuals performing personal service not part of the duty of the Company, such as "red caps," travelers aids, and so forth. This scope rule, supplemented by the exemption quoted above, operated to exclude from the coverage of the agreement so-called "red caps" whose duties at the time were not considered to be a part of the service rendered by a carrier to its patrons. But where employees were engaged who performed custodial service, such as cleaning, carrying messages, operating elevators, and the like, these employees were recognized as coming within the purview of the agreement and were paid hourly, daily, or monthly rates of pay the same as all other railroad employees, and otherwise were subject to the provisions of the Brotherhood's national labor agreement.

8. Decision No. 119 of the United States Railroad Labor Board, which abrogated the national agreement effective July 1, 1921, outlined a procedure to be followed by individual carriers and representatives of their employees

in negotiating labor agreements to replace the national agreement of January 1, 1920. In conformity with this decision, the Brotherhood, representing the craft or class of clerical, office, station, and storehouse employees in the service of the Company, negotiated an agreement with the Company effective July 1, 1921, which agreement, except for amendments, has been in continuous effect ever since. This agreement included an adaptation of the scope rule contained in the national agreement, but did not exempt employees who might be considered to perform personal service for railroad passengers because there were no employees whose duties were confined solely to such personal service, since all employees in this general group were subject to the performance of some janitorial or custodial duties. Later, on February 1, 1922, the U. S. Railroad Labor Board issued Decision No. 630, which, among other things, dealt with the question of the scope of agreements covering clerical, office, station, and storehouse employees. This decision again observed the same distinction as to coverage that was observed in the Brotherhood's national agreement in that it excluded from its application "individuals performing personal service not a part of the duty of the carrier."

9. Subsequent to the issuance of the foregoing decision, most agreements negotiated by the Brotherhood with carriers, establishing the labor standards of clerical, office, station, and storehouse employees with but relatively few exceptions, carried a provision excluding from the application of these agreements employees performing personal service not a part of the duty of the carrier. Where, on the other hand, employees were found who, in addition to performing personal service for patrons of the railroads, also performed custodial tasks, these employees were covered by the agreements negotiated by the Brotherhood. Included among these carriers, according to the evidence, are the Union Pacific Railroad Company and the Louisville and Nashville Railroad Company.

10. Where the National Mediation Board has investigated representation disputes involving individuals in the service of the railroads performing so-called personal services for railroad passengers, such employees who, in ad-

dition to performing personal service for passengers, also perform related custodial duties for the carriers, by mutual agreement between the contesting organizations, have been excluded from the list of eligibles. This is true in the following cases:

R-563—Baltimore & Ohio Chicago Terminal
R-557—New York Central
R-558—Cleveland Union Terminal
R-622—Chicago, Milwaukee, St. Paul and Pacific
R-550—Chicago, Rock Island & Pacific

Furthermore, irrespective of what organization has been designated as representing so-called "red-caps"—employees performing only personal service for passengers—such organizations and the carriers concerned have invariably negotiated separate agreements establishing the labor standards of their employees. On the other hand, where employees who, incident to their personal service for passengers, also perform custodial duties for carriers, are covered by agreements, such agreements cover the entire craft or class of clerical, office, station and storehouse employees. This situation prevails in the agreements between the Brotherhood and the Louisville and Nashville Railroad Company, and also the Union Pacific Railroad. Similarly, where the Brotherhood has been designated as the representative by employees exclusively performing personal service for passengers, the Brotherhood consistently has negotiated a separate agreement establishing the labor standards for these individuals, as, for example, on the Kansas City Terminal.

DISCUSSION

In questions of craft or class determination the Board gives consideration to many factors, most important of which are the intent and purpose of the Railway Labor Act in the matter of labor representation and the maintenance of sound labor relations on the railroads. Each individual case, of course, requires consideration of many facts peculiar to the particular situation, but, in addition, there are general factors to be considered. These include the composition and relative permanency of the employee group-

ings along craft or class lines for representation purposes not only on the particular carrier but on the railroads generally. The extent and effectiveness of past collective bargaining arrangements on the part of the employees regarding seniority, promotion and demotion are other factors which must be considered, as are the duties and responsibilities of the employees and the nature of their work. Previous decisions of the Board which bear upon the issues involved in a particular controversy are also taken into account. All of these factors have received the consideration of the Board in coming to a conclusion respecting the issues involved in this case.

The record in this case is replete with evidence in support of the position that for many years the employees here concerned have been a part of the craft or class of clerical, office, station and storehouse employees in the service of the Company.

While the United has referred to the employees in question as "red caps," the record shows that the Company does not employ any individuals so classified. Instead, these employees have been for many years designated by the Company as "station porters." On its monthly wage statistics report to the Interstate Commerce Commission, the Company has regularly stated that it has no "red caps." Instead, the compensation for station porters is reported under the title, "Baggage, parcel room and station attendants." Moreover, on December 2, 1937, in its response to an Interstate Commerce Commission questionnaire, the Company described the duties of the employees here involved and stated that the title of their positions was "station porters."

Because for many years custodial and related services have been required of these employees in addition to the personal service they rendered to passengers, the Company has paid them regular compensation and in other respects has considered them as full fledged employees. In addition, the station porters have, since the days of Federal control of the railroads to the present, been subject to the same adjustments in rates of pay as the other employees who compose the craft or class of clerical, office, station and storehouse employees. Thus, station porters have bene-

fited from the collective bargaining efforts of the Brotherhood just the same as all other employees represented by the Brotherhood.

During the period of Federal control of railroads, the Brotherhood was party to a national agreement covering the craft or class of clerical, office, station and storehouse employees. Specifically included in the scope of that agreement were messengers, janitors and elevator operators and excepted therefrom were "individuals performing personal service not a part of the duty of the carrier." That national agreement applied to the employees of the Company. When the operations of the railroads reverted to their individual owners, a new agreement was consummated between the Company and the Brotherhood. This agreement did not contain the provision excepting "individuals performing personal service not a part of the duty of the carrier," because such individuals in the service of the Company were considered to be employees of the Company and subject to the agreement. This agreement, with revisions as agreed upon from time to time, has remained in effect continuously since July 1, 1921, when it first became effective.

Under this agreement the Company has annually prepared and issued seniority rosters for "station porters." The United has protested that the very fact that the Company has issued separate seniority rosters for station porters indicates of itself that they are a separate craft or class. With this, however, the Board cannot agree for the record reveals that the employees who compose the craft or class of clerical, office, station and storehouse employees of the Company are carried on seven separate seniority rosters. For example, the employees in the auditor's office are on a separate roster from those employed in the baggage and mail room. Both of these groups, however, are part of the craft or class of clerical, office, station and storehouse employees.

But there is still another aspect of the question of seniority which nullifies the position taken by the United. Seniority rights are one of the products of collective bargaining and are not inherent rights of the employees until established by agreement applying to all the employees.

Thus, the very facts that station porters are carried on seniority rosters, that their positions are bulletined and assigned to the applicant with the greatest seniority, that they have "bumping" rights—all of these circumstances demonstrate that station porters have acquired benefits in the form of seniority rights as members of the craft or class of clerical, office, station and storehouse employees through representation on the property by the Brotherhood.

The United has stated that, although the Brotherhood claims station porters as a part of the craft or class of clerical, office, station and storehouse employees, there has been no effective collective bargaining for them. It has already been pointed out that the wage rates of station porters have for many years fluctuated along with the wage rates of other members of the craft or class. The discussion in the above paragraph respecting seniority rights goes further towards invalidating the position taken by the United. Finally, the record shows that there have been numerous individual grievances concerning rates of pay, rules and working conditions of station porters handled by the representative of the Brotherhood on the Company's property. All of these facts show that there has been effective collective bargaining for the station porters along with the other employees represented by the Brotherhood.

The United has pointed to the fact that it has authorizations from all of the employees involved to serve as their representative, whereas none of the employees has signed authorizations in favor of the Brotherhood. This, claims the United, shows the desires of the employees, in so far as representation is concerned. From this the United reasons that to include station porters with the craft or class of clerical, office, station and storehouse employees is to deny them freedom of choice of their collective bargaining representatives. The problem of small groups of employees attempting to withdraw from established crafts or classes and set themselves up as a separate craft or class is not a new one to the National Mediation Board and it has been commented on frequently in the Board's annual reports to Congress. The Railway Labor Act contemplates that the representation of a craft or class shall be deter-

mined by the will of the majority. This does not mean that minority groups shall have no voice respecting the determination of policy for the entire craft or class nor that they shall suffer tyranny at the will of the majority. Instead, it means that, by cooperation between the various interests involved, policies will be evolved that will serve the best interests of all. It is unfortunate that apparently there has been little if any such cooperation between the employees here concerned and the other members of the craft or class, otherwise the questions here at issue would hardly have arisen.

The United has charged that the scope rule of the agreement between the Brotherhood and the Company does not embrace the employees here involved. While it is true that the scope rule does not specifically list either "red caps" or "station porters," it does specifically name "messengers" and "elevator operators." And the record shows that some of the employees concerned serve as messengers and elevator operators in addition to their other duties. It seems reasonable to conclude that if the Brotherhood had not felt that these employees were a part of the craft or class which it represents on the property, it would long since have lodged a protest against their being assigned work that was specifically reserved to the craft or class in the scope provisions of the agreement. No such protest has been made, however.

There is still another point that should be commented upon in this connection. It is generally true that the scope provisions of labor agreements do not embrace all occupational titles covered by the agreement. Rather, the scope provisions are designed to encompass the general field of the agreement's coverage. More important than the actual wording of the scope provisions is the record of collective bargaining experience under the agreement. In this case there is an abundance of evidence showing that station porters have consistently been treated as subject to the agreement since the entire craft or class became subject to the agreement effective January 1, 1920.

The employees here involved are colored and because of this they are not eligible for membership in the Brotherhood. It has been implied that by this fact it is recognized

that these employees are a separate craft or class. With this position the Board cannot agree because there is no relationship in the Railway Labor Act between representation and membership or non-membership in a labor organization. Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the representatives' organization as well as those who are members.

Much attention in this case has been centered upon the proportion of time devoted by the employees to "red cap" service on the one hand and to janitor or custodial service on the other. The United has charged that the preponderance of time is, on the average, devoted to "red cap" service. The Brotherhood alleges that the opposite is true. The Company has stated that the division of time is about equally divided between the two types of duties. While the results of the Board's investigation support the position taken by the United the question of preponderance of service is not of conclusive importance in this case in that it is overshadowed by more basic considerations.

CONCLUSION

Based upon the record it is the conclusion of the National Mediation Board that the station porters employed by the St. Paul Union Depot Company are part of the craft or class of clerical, office, station and storehouse employees and not a separate craft or class for the purposes of the Railway Labor Act. No dispute over representation has been found by the Board to exist among the craft or class of clerical, office, station and storehouse employees in the service of the Company. For these reasons the Board hereby dismisses the application of the United Transport Service Employees of America.

By order of the National Mediation Board.

Robert F. Cole,
Secretary.

ANSWER OF DEFENDANTS BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS, AND STATION EMPLOYEES, AND GEORGE M. HARRISON.

Now come the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, individually and as Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, intervening defendants herein, leave of court having previously been obtained for such intervention, and for their answer to the complaint, say as follows, to-wit:

1. They admit that this court has jurisdiction of the controversy as set forth in Paragraph 1 of the complaint.

2(A). They admit that plaintiff United Transport Service Employees of America is a voluntary unincorporated association having its principal offices in the city of Chicago, State of Illinois, and that it is a labor union composed of "red-cap" employees of various railroads and terminal stations throughout the United States, but deny all other allegations of fact contained in paragraph 2(A) of the complaint.

2(B), (C), (D), (E), and (F). They admit that the individual plaintiffs named in 2(B), 2(C), 2(D), 2(E), and 2(F), of the complaint, to-wit: John R. Lawrence, Jr., W. A. Young, W. W. Bowen, L. A. Guinn, and I. M. Dorsey, are each and all citizens of the United States, Residents of the City of St. Paul in the State of Minnesota, and employees of the St. Paul Union Depot Company, but deny each and every other allegation contained in the said paragraphs 2(B), 2(C), 2(D), 2(E), and 2(F), of the complaint not specifically admitted herein to be true.

2(G). Thy deny each and every allegation contained in Paragraph 2(G) of the complaint.

3(A). They admit the truth of the allegations of Paragraph 3(A) of the complaint.

3(B). They admit the truth of the allegations of Paragraph 3(B) of the complaint.

3(C). They admit the truth of the allegations of Paragraph 3(C) of the complaint.

3(D). They admit the truth of the allegations of Paragraph 3(D) of the complaint.

4. They deny each and every allegation of fact contained in Paragraph 4 of the complaint.

5. They are advised that certain of the allegations of Paragraph 5 of the complaint constitute legal conclusions and inferences which they are not obliged to answer. Insofar, however, as the allegations of this paragraph are or may be construed as being allegations of fact, they admit them in part, deny them in part, and in part deny them for want of knowledge, as follows, to-wit:

The intervenors are without knowledge as to the truth or falsity of the allegations contained in the first, second, and third sub-paragraphs of paragraph 5 of the complaint, and therefore deny the same for want of such knowledge.

They admit that a certain agreement entered into by and between the St. Paul Union Depot Company and the employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, on July 1, 1921, has contained and does contain a provision in Rule 1 thereof phrased in the language quoted in this paragraph, and that the said quotation is a true and correct copy of a portion of said Rule 1. They further admit that plaintiffs or some of them invoked the services of the National Mediation Board on or about February 3, 1939, for the purpose of investigating an alleged representation dispute involving station porters of the St. Paul Union Depot Company; that the National Mediation Board assigned a mediator to make a preliminary investigation of the situation, and that the National Mediation Board stated its position to be that the plaintiffs should be allowed to withdraw their invocation of its services for the reason that the employees involved did not constitute a separate class or craft of employees; that the "United" insisted upon a formal hearing; that such hearing was held on May 6, 1940 in a proceeding bearing Docket Number R-635 as alleged in Paragraph 5 of the complaint; that testimony was received; that briefs were

filed by plaintiff and by the intervenor, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and that the issue considered related to the (3) question of whether or not employees involved constituted a separate craft or class for representation purposes within the meaning of the Railway Labor Act or whether they were a part of the craft or class of clerical, office, station and storehouse employees. The intervenors further admit that the evidence presented at the hearing aforesaid showed that about 45 men were involved who were designated on the payroll of the employer as station porters; that all worked on an hourly basis and at three different rates of pay, and that the National Mediation Board found that a major portion of their time was and is devoted to services rendered for passengers passing through the St. Paul Union Depot, and a lesser portion was and is devoted to janitor or custodial services rendered directly for the St. Paul Union Depot Company. It is further admitted that the National Mediation Board after hearing the testimony aforesaid and considering the briefs filed, handed down a written finding dismissing the invocation for the reason that employees involved did and do not constitute a separate craft or class of employees entitled to separate representation. A copy of this finding is hereto attached, marked Exhibit A and made a part of this answer by reference. They admit that a certain purported quotation from this finding and inserted in Paragraph 5 of the complaint is a true and correct copy of the conclusion of the National Mediation Board in said case.

Further answering, the intervenors deny each and every allegation of fact contained in paragraph 5 of the complaint not heretofore denied for want of knowledge or (4) not specifically admitted herein to be true.

6. They deny each and every allegation of fact contained in paragraph 6 of the complaint, and further answering the allegations of said paragraph 6, say that the National Mediation Board found as follows, to-wit:

While the plaintiffs constantly referred to the employees in question as "red-caps" the St. Paul Union Depot Company does not so classify any of its employees, but

classified and reports said employees as "station porters." The said employees, in addition to assisting passengers with their luggage perform numerous duties in and about the station such as cleaning windows, dusting benches, cleaning office space occupied by the Company as well as by its tenants such as the Pullman Company and the Canadian Pacific Railway Company, cleaning away ice and snow and sanding pathways and platforms in the winter, clipping hedges, performing gardening work and trimming lawns in the summer, clearing away trash in driveways, cleaning light fixtures, shining cuspidors, cleaning telephone booths, sweeping the stairs and lobby of the station, mopping the public toilets, polishing brass, cleaning glass, cleaning the ticket and telegraph offices, locker rooms, and drinking fountains, cleaning bowls and supplying towels in the washrooms, performing inter-office messenger services, relieving elevator operators, and stamping and stringing parcel checks. The said employees are not now and have not been at least since the year 1920 dependent for their income in whole upon tips received, but since the year mentioned, have received a regular wage paid to them by the St. Paul Union Depot Company. (5.)

The first agreement affecting station employees of the St. Paul Union Depot Company was negotiated in January, 1920, (during the period of Federal control of railroads), between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the United States Railroad Administration. This agreement applied to laborers in and around stations, storehouses and warehouses among others, but specifically exempted individuals performing personal services not a part of the duty of the carrier such as "red-caps."

At the termination of Federal control, a new agreement was entered into between the defendant brotherhood and the St. Paul Union Depot Company covering among others, employees serving as messengers, elevator operators and laborers employed in and around stations and warehouses. No exception was made in this agreement of individuals performing personal services not a part of the duty of the carrier for the reason that the St. Paul Union

Depot Company was deemed to have no such individuals so engaged on its property. This agreement with amendments not affecting its scope or coverage is still in effect.

During the terms of the agreement aforesaid, the wages of employees involved in this case have been fixed by action of the defendant Brotherhood, regular seniority rosters have been posted for them and their rights to certain jobs in order of seniority have been determined according to the provisions of the said contract. Any grievances affecting them have been handled by the defendant Brotherhood acting through its duly selected officials. (6.)

Although some of the services performed by these employees, namely those of elevator operators, station janitors, and laborers are clearly and expressly within the scope rule of the aforesaid agreement, the defendant Brotherhood has never claimed that station porters should be excluded from those duties, a position which it would normally have taken had they been considered not to be members of the craft or class of employees for which the agreement was negotiated.

Both the St. Paul Union Depot Company and the defendant Brotherhood are and have been of the opinion that the existing agreement covers the employees in question and both are willing to continue on that basis.

These defendants say that the foregoing facts were found by the National Mediation Board to be true; that such finding was supported by substantial evidence, presented to the Board in the course of the hearing aforesaid, and the defendants allege that each and every of the said facts are true and correct.

These defendants specifically deny that the procedure or findings of the National Mediation Board were arbitrary, capricious, contrary to law, or that they in any way exceeded the statutory authority of said Board, and further deny that said procedure or findings in any way violated the rights of the plaintiffs or any of them or of any of the said station porters whether conferred by the Constitution of the United States or otherwise.

7. These defendants deny each and every allegation of the complaint not specifically admitted herein to be true or not denied for want of knowledge. (7.)

Wherefore, having fully answered the allegations of the complaint, these defendants pray that the same be denied and dismissed at the plaintiff's costs.

Frank L. Mulholland,
1041 Nicholas Building,
Toledo, Ohio.

Clarence M. Mulholland,
1041 Nicholas Building,
Toledo, Ohio.

W. H. McEwen,
1041 Nicholas Building,
Toledo, Ohio.

Edward C. Kriz,
1416 F. Street, N. W.
Washington, D. C.,
of Counsel.

Of Counsel:
Mulholland, Robie & McEwen,
1041 Nicholas Building,
Toledo, Ohio.

AMENDMENT TO ANSWER

Pursuant to leave of court granted at the pretrial conference of this action, on April 14, 1942, the defendants amend the answer heretofore filed by striking therefrom paragraph 7 and substituting in lieu thereof the following paragraph:

Further answering the complaint, defendants aver that:

7.

Pursuant to the invocation of services by plaintiff association, the defendant National Mediation Board held a hearing at which the issues presented were fully developed by testimony, exhibits and argument, and on the basis of the record the said Board made findings of fact determining such issues. These findings of fact are set forth in the Board's Order of November 26, 1940, which is attached hereto and marked Exhibit A, and are supported by substantial evidence contained in the transcript of the record before the Board, which is attached hereto and marked Exhibit B. The said findings and order of the Board are not arbitrary, capricious, or otherwise contrary to law, but constitute instead a valid exercise by the Board of its duties and functions under the Railway Labor Act and are therefore binding on this court.

Wherefore, having fully answered the complaint, the defendants, pursuant to Rule 56(B) of the Rules of Civil Procedure, move for a summary judgment in their favor and for the dismissal of the complaint at plaintiff's cost.

S. R. Brittingham, Jr.,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.,
Counsel for Defendants National
Mediation Board and Members.

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS BEFORE THE NATIONAL MEDIATION BOARD, THE SAME BEING EXHIBIT B ATTACHED TO THE AMENDED ANSWER OF THE NATIONAL MEDIATION BOARD

W. S. TOWNSEND

was called as a witness on behalf of the International Brotherhood of Red Caps, was duly sworn, and testified as follows:

DIRECT TESTIMONY

The Witness: This letter of September 23, 1939, is addressed to Mr. Willard S. Townsend, President, International Brotherhood of Red Caps, 3451 Michigan Avenue, Chicago, Illinois, and reads:

"Dear Sir:

"Reference is made to your application for the services of the Mediation Board in connection with representation dispute among Red Caps, employees of the St. Paul Union Depot Company.

"This case was investigated by Mediator Murray in St. Paul, and he held conferences with representatives of the interested parties as well as with the carrier, at which the following facts were developed:

"The application lists the employees involved as 'Red Caps.' The records of the company show them to be carried under the payroll title of 'porters.'

"Approximately 40 employees are involved, of which the applicant, the International Brotherhood of Red Caps, holds 31 authorizations.

"The positions involved require occupants to perform usual porter service such as mopping floors, washing windows, sweeping floors and platforms, dusting, cleaning snow and ice from platforms and sidewalks, spreading sand and salt on icy platforms and walks, polishing brass and picking up in general about the station grounds, cutting lawn and trimming hedges about passenger station lawn, and work of a like nature usually performed by porters and janitors.

In addition to this service they act as Red Caps serving the traveling public. The major portion of their time is devoted to regular duties other than that of personal service to patrons.

"Wages of these employees have been increased and decreased in accordance with settlements affecting clerical and station forces. The last increase of five cents per hour was granted in August, 1937, making their present rates $2.59 per day.

"The Clerks' agreement provides for seven seniority departments. The station department with a list of 55 employees includes these 40 porters.

"The representatives of the carrier and the Clerks' organization both agree that the porters come within the provisions of the scope rule of the Clerks' agreement, and that other provisions of the Clerks' agreement have been applied since the contract was entered into on July 1, 1921. Porters are reported to the I. C. C. under Reporting Division No. 87, baggage, parcel room and station attendants.

"The representatives of the International Brotherhood of Red Caps contend that regardless of whether the agreement does or does not apply, the employees constitute a separate class or craft and should be permitted to select their representatives on that basis.

"You will recall that in investigation of our cases R-550, Representation of Red Caps on the Chicago, Rock Island and Pacific Ry., and R-557, Representation of Red Caps on the New York Central Railroad, representatives of your organization expressed the desire to avoid so far as possible any jurisdictional dispute with other organizations, and in keeping with that policy eliminated such employees as were found to be covered by the existing agreements of the Brotherhood of Railway and Steamship Clerks.

"Under these circumstances are you not agreeable to withdrawing this invocation, since the preliminary facts developed by our mediator indicate that the conditions at St. Paul resemble in a general way those developed in the Rock Island and New York Central cases.

"Yours very truly,

"Robt. F. Cole,

"Secretary."

By the Chairman:

Q. Now, I would like to know what is your position on that letter. Are the facts therein set forth correct? A. I cannot say that, in their entirety, they are correct. I was in St. Paul six or seven weeks ago—about seven weeks ago—and made an investigation that reveals that the men work three hours as janitors, and porters.

Q. You make that general statement now, that these men work three hours as porters and as janitors? A. Yes.

Q. And five hours— A. As red caps.

Q. Is that on the average? A. That is the average I got in talking with the men in St. Paul.

Q. But they do work as janitors and do porter work? What else do they do? A. As outlined in this letter. They do virtually everything there.

Now my contention, based on this letter, Mr. Chairman, is the fact that they have these seven seniority departments or rosters and surely, if there are seven seniority rosters, and these men are carried on a separate roster, it isolates them from the rest of the men.

Q. Your contention is that wherever a separate seniority roster is maintained, that that constitutes a craft or class within the meaning of the Railway Labor Act, and, therefore, those particular employees, so carried, may designate representatives of their own for the purpose of the Railway Labor Act? A. I am forced to take that position. You see what we have. Our case is one of many such cases which no doubt you have experienced and in my summary I made this observation, that we were not so greatly concerned whether we represented them or the Clerks represented them, but we definitely feel if the Railway Labor Act is workable then these men should have some voice in determining what their working conditions should be.

Q. I am not so positive it is within the province of this Board to settle that. It may be that that is something that only Congress can settle, if there is something which does not meet your particular views in the matter. All we can settle this morning is what constitutes a craft or class for the purpose of representation under the Railway Labor Act. A. Then I stick to the position that if these men are

carried under a separate seniority roster, then they are entitled to be represented by men of their own choice.

Q. And from your knowledge and belief, they are carried on separate seniority rosters? A. According to the information embodied in this letter.

* * * * *

By the Chairman:

Q. Now, just to be of a little help to you in this situation, I would like you to answer this question at this juncture: What are the factors that this Board should take into consideration in determining what constitutes the craft or class of red caps? We want as much light from you gentlemen on that as we can possibly get. We will look around elsewhere and will give you the same chance to look at the things we look at, but I would like you to tell us what are the elements that you would have us consider in drawing, as you said a little while ago, the line around these employees, all of whom, within that line, constitute red caps. What are the factors that you want to call to our attention now? A. I call to your attention they have a separate seniority roster.

Q. That is Item 1 as far as these particular employees are concerned, but you enlarge your contention and say that all employees, wherever found, that wear a red cap and do this attendant's work and do messenger work, etc., are red caps as nearly as you understand.

If that is your position, we want to know that. We would like to know from you what these specific, concrete factors are that operate to— A. Mr. Chairman, it is my opinion that where a group of workers work a majority of their time at one given occupation, that occupation overlaps the other duties that they perform.

Q. Then the converse would be true, namely, that if those red caps at the St. Paul Union Depot Company—that if their duties consisted, 51 per cent of the time, in performing janitor service, icing, etc., they would not be red caps? A. That is true.

Q. In other words, one of the factors you urge is where the predominance of their service lies—whether it lies in the red cap service or on the other side? A. That is right.

Q. And in substantiation of that you make the contention they work three hours as janitor and five hours as a red cap? A. Yes.

By Mr. Davis:

Q. Now, Mr. Townsend, I believe I understood you to say that the prime reason you offer for the contention that the red caps, or so-called red caps, at St. Paul, are a separate class or craft is that they are on a separate seniority roster. You know, of course, there are a number of separate seniority rosters on that property under our agreement and, by the same token, will you say that, on the other seniority rosters, the employees on those rosters constitute a separate class or craft for the purpose of representation under the Act? A. Yes.

* * * * *

C. S. CHRISTOFFER

was called as a witness by the National Mediation Board, was duly sworn, and testified as follows:

DIRECT EXAMINATION

By the Chairman:

Q. Will you please tell us your position for the benefit of the record? A. I am Vice President and General Manager for the St. Paul Union Depot and the Minnesota Transfer Railroad.

* * * * *

Now, these red caps perform, I would say, a 50-50 proposition. It may border on the 40 in some instances and on the 60 in other instances. If they are around there and there is something to be done, the Station Master assigns it to them and tells them to do it, and this past winter we had considerable snow and I would say that they spent—

practically all of them—their entire time between trains keeping the walks clear.

We bulletin the positions and we assign them in accordance with their seniority and give them all the privileges of the agreement that the other crafts obtain.

Q. You mean the other groups? A. The other groups under the agreement obtain, yes.

I might add, just for the record, for the reason that there was some contention made, that the red caps or porters were not included in the wage reductions or the restoration of pay.

On February 1, 1932, there was a 10 per cent reduction made of all classes including porters and red caps. On July 1, 1934, 2½ per cent of that reduction was restored. On January 1, 1935, 2½ per cent was restored, and April 1, 1935, the remaining 5 per cent was restored.

Now, in the general wage increase which was effective August 1, 1937, the daily rate was increased from $2.19 to $2.59. So, in every instance whatever applied to the scope of employees under the Clerks' agreement, the porter-red caps were given the same increases.

Now, as to their general duties: We have a group that comes in at 5:00 o'clock in the morning that cleans the offices and I might, if the Board so desires for the record, show what each one of these red caps does.

Q. That is exactly what we would like to get. Any light you can possibly shed on that will be helpful to the Board. A. Position No. 1, 7:00 a. m. to 4:00 p. m. This is an old gentleman who is about 70 years of age and we created a special position for him to take care of him. His title is "Special Porter." He is a messenger. He takes care of the toilet soap and paper cabinets, does red cap duties and also any other special service as required in or about the station.

Position No. 2, 7:00 a. m. to 4:00 p. m. He is assigned to dusting the benches, general utility work and cleaning the glass in front doors, phone booths and Wacouta Street main lobby.

Position No. 3, 7:00 a. m. to 4:00 p. m. He dusts the main lobby, and takes care of the parcel room, washes

benches and other utility work and also washes the glass in front doors, Sibley Street and women's room and brushes the main lobby.

Position No. 4, 6:30 a. m. to 3:30 p. m. He sweeps the stairs to tracks 1, 2, 3, 4, 5 and 6, washes lights and general utility work and brushes the concourse.

Position No. 5, 6:30 a. m. to 3:30 p. m. He sweeps stairs to tracks 7, 8, 9, 10, 11 and 12, sweeps the front lobby, washes lights and general utility work and mops the public toilet.

Position No. 6, 6:30 a. m. to 3:30 p. m. Sweeps front walk, driveway and Sibley and Wacouta Street sidewalks, polishes brass on front doors, and cleans glass in concourse gates.

Position No. 7, 5:00 a. m. to 1:30 p. m. Cleans ticket office, brushes concourse, polishes brass in ticket office and women's room and 45 minutes' relief of elevator operator.

Position No. 8, 5:00 a. m. to 1:30 p. m. Cleans ticket office, stamps tags, 15 minutes elevator operator relief, and polishes brass rails on front doors and women's room.

Position No. 9, 5:00 a. m. to 1:30 p. m. Cleans porters' and gatemen's locker rooms, mops stairways and landings, front, east and west, and polishes brass rails on front doors.

Position No. 10, 5:00 a. m. to 1:30 p. m. Dusts main floor, cleans drinking fountains and cleans men's wash room.

Position No. 11, 5:00 a. m. to 1:30 p. m. Sweeps and dusts Canadian Pacific and Pullman offices, hall between stairways on Third Street level, both sides; cleans bowls and puts paper and towels in gatemen's and porters' locker rooms, sweeps and dusts telegraph office and mops it on Mondays, cares for lawn, hedge, brass on benches, concourse doors, cleans windows in concourse doors and baseboards.

Position No. 12, 5:00 a. m. to 1:30 p. m. Cares for lawn and hedge, shines cuspidors and puts them in place, dusts off all lockers, mops hallway entrance to men's toilet, dusts check room and cares for brass and windows on concourse doors and general utility work.

Position No. 13, 4:00 p. m. to 1:00 a. m. Cleans parcel and baggage room, sweeps passageway from north of concourse to main lobby, picks up paper second floor, washes cuspidors and mops men's toilet, ladies' toilet, Mr. Christoffer's office and other offices.

Position No. 14, 4:00 p. m. to 1:00 a. m. Cleans men's toilet, sweeps front lobby and mops men's toilet, ladies' room and toilet, both front vestibules, switchboard room, telephone booths and telegraph office.

Position No. 15, 4:00 p. m. to 1:00 a. m. Sweeps concourse, dusts benches and cleans men's toilet; brushes up main lobby and mops men's toilets, ladies' room and toilet, both front vestibules, switchboard room, telephone booths, telegraph office and, every Wednesday, the parcel room.

Position No. 16, 4:00 p. m. to 1:00 a. m. Sweeps main lobby, cleans men's toilet, main floor and sweeps vestibules, lobby, telegraph office and ladies' room, passageway and concourse.

Position No. 17, 4:00 p. m. to 1:00 a. m. Polishes brass four days upstairs and the second floor Wednesday and Saturday and mops general office. Brushes up paper in passageway from lobby to concourse and sweeps general office, other offices, hall and both toilets on second floor; cleans toilet bowls and urinals, dusts and mops toilets and hall and cleans Mr. Christoffer's office once weekly.

Position No. 18, 4:00 p. m. to 1:00 a. m. Polishes brass four days on second floor and on Wednesday and Saturday mops general office; brushes up ladies' room and toilet and sweeps front lobby. vestibules, passageway and concourse.

Position No. 19, 5:30 p. m. to 2:00 a. m. Sweeps concourse, places carts for trains, picks up cuspidors on main floor and washes them; takes all paper in cartons on main floor and the sawdust used during the day to the dump and sweeps stairs to tracks 15, 16, 17, 18, 13 and 14 and also dusts stairs.

Position No. 20, 5:30 p. m. to 2:00 a. m. Relieves elevator operator on elevator No. 1, cleans men's wash room and mops main floors.

Position No. 21, 5:30 p. m. to 2:00 a. m. Sweeps concourse, and mops concourse or front lobby and passageway.

Position No. 22, 5:30 p. m. to 2:00 a. m. Sweeps the concourse, mops main lobby and passageway of concourse.

Position No. 23, 5:30 p. m. to 2:00 a. m. Sweeps halls on Third Street level, and mops these halls on Wednesdays and Saturdays. Also mops main floor front lobby or concourse and passageway.

Now, the balance of the positions are relief positions and they do the assigned duties of the other positions on the days that they are employed.

Q. Do these employees, may I ask, Mr. Christoffer, do any so-called messenger work? A. No, Mr. Beyer; we have one man assigned to messenger service. That is the elderly gentleman who has been around there about 40 years.

Q. He does messenger service? A. And also red cap service. He usually meets the passengers at the front door and carries the bags into the location where they assemble them for the trains. He is not physically fit to run up and down the stairs.

Q. I did not want to interrupt you. A. I think that is all I want to make as a general statement.

The Chairman: Perhaps Mr. Davis wants to ask some questions.

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Now, as I explained, these men that go to work at 5:30 in the morning are busy cleaning the offices until about 7:00 o'clock and then from 7:00 o'clock until 9:00 o'clock they are busily engaged in taking care of the public. Then there are a few scattering trains where one or two will take care of the red cap work and the balance of the time they are engaged in cleaning.

Then, about 12:15 we have two trains due out. One is the Rock Island Rocket, at 12:50, and the Milwaukee Hiawatha at 1:10 o'clock. The entire force at that time is busily engaged from 12:15 to 1:10. From then to 3:00 o'clock we have no trains of any consequence and then we have the Burlington Zephyr which is due to leave at 3:00 o'clock and the Northwestern 400 which is due to depart at 4:00 o'clock, and then they are all through until their tour of duty ends.

So, there are two hours in the morning and one hour at noon and then the second shift comes on from 3:30 to 6:00 o'clock and they have, as you will see, some of them from 5:30 in the morning and the others from 9:00 o'clock busily engaged in cleaning in and around the station and, to the best of my judgment, I would say that it is about equally divided—50 per cent janitor service and 50 per cent red cap service.

You understand, I do not care who represents the red caps. I am dealing with the agreement we have at the present time.

The Chairman: I understand.

By Mr. Davis:

Q. Is it not a fact that these so-called red caps or porters are carried on the seniority rosters posted under our agreement? A. Yes, I have a big file here. These are all files on bulletined vacancies and that practice has been going on ever since the contract was made with the Clerks in, I think, 1921, is it not?

Q. That is right. A. And any time there is a vacancy or change the positions are bulletined, and if the Board cares to look at all these, it shows the applications and those that have applied for them. New positions, when established, are bulletined.

The Chairman: What I would like to do right there is to give us a couple of typical examples of bulletins that have been posted.

The Witness: This is Bulletin No. 6, dated July 20, 1938:

"Written applications will be received in this office for the following position, bids to close at 5:00 p. m., July 23:

"Department—station.

"Position—No. 22.

"Title—Porter.

"Hours—6:00 p. m. to 2:30 a. m.

"Rate of pay—$2.59.

"Day off—12-27.

"L. A. Devolski,
"Station Master."

The Chairman: Will you give us some earlier bulletins?

The Witness: Here is the man who was assigned.

"Referring to Bulletin No. 6 of July 20, 1938, Porter Bishop Neal has made written application for this position and same is assigned to him."

Now, I do not have any earlier ones. I just brought the file that I have since I got there. That has occurred since 1938.

The Chairman: When you say "Bulletin No. 6" is that Bulletin No. 6 for that year?

The Witness: Yes.

The Chairman: You have a new series every year?

The Witness: We have a new series every year, yes, sir.

The Chairman: From your knowledge, how far back have you been pursuing the practice of bulletining those jobs?

The Witness: I talked to Mr. Devolski and he said that has been the practice ever since the Clerks' organization's contract took effect, which was 1921.

By Mr. Davis:

Q. In other words, the rules and provisions of our schedule on your property are applied to these porters or red caps just like they are to any other group that comes under that schedule? A. Yes, sir; that is the truth.

Q. How do you carry them on the payroll? A. They are carried on the payroll as porters.

Q. And they are reported to the Interstate Commerce Commission under Reporting Division No. 87? That is a new number. A. Yes, as station attendants.

Q. Baggage, parcel room and station attendants?

By the Chairman:

Q. Do you know how the railroads are reporting the red caps? A. We do not report them as red caps.

Q. I know there is no such designation in the I. C. C. wage statistics, but I am wondering under what number they are reporting them. A. I might add another thing that may help to clarify the situation. I do not believe there is any misunderstanding among the men out there

because we have a rule under our agreement that if a man wants to take leave of absence he makes application for it and the limit is 90 days.

Here is a letter from Vic Calloway. He says:

"To the Union Depot Company. Captain Brow:

"I am requesting a 90-day leave of absence from the Depot Company to go and work for the M. P. Dining Car Department."

That leave was granted him under date of June 25, 1937, and this reads:

"Your request for leave of absence not to exceed 90 days is hereby granted.

"Signed E. J. Sawyer,
"Station Master."

By Mr. Davis:

Q. Mr. Christoffer, it is a fact, is it not, that on your property, these porters have always been considered as employees of the carrier? A. That is correct.

Q. And have also always been reported to the Interstate Commerce Commission? A. That is correct.

Q. Long before the Commission made its investigation as to the status of the red caps? A. Yes, sir.

* * * * *

The Witness: I think, Mr. Chairman, I will leave for your information a statement that I have prepared here and I suppose I had better read it so Mr. Townsend will have the information.

This is the application of all wage awards to the rate of pay of porters.

"Porter's rate of pay prior to General Order No. 27	$45.00 per mo.
"Increased under General Order No. 27, June 1, 1918	65.00 " "
"Increased under Supplement No. 7 to G. O. No. 27	70.00 " "
"Increased under Decision No. 2 to	80.20 " "
"Decreased under Decision No. 147 to	60.00 " "

"Placed on daily basis under Decision No. 630—2/1/22 2.11 per day

"Increased under Decision No. 1986—10/16/23 2.19 " "

"10% wage reduction 2/1/32—Restored in full by March 31, 1935.

"Increased granted August, 1937, to "Saint Paul, June 6, 1939." 2.59 per day

* * * * *

Q. Tell me something about any grievances. You have had illustrations here of so-called positions having been bulletined applying to the porters. Now, maybe, perhaps, Mr. Twomey can answer this question—

Mr. Davis: I can bring that out later.

The Witness: Just a few days ago Mr. Twomey talked to me about a case. On April 1 we took over the concessions in the station, the restaurants and stands and fountains and there was a bootblack employed by the Union News Company and he was paid, I think, a dollar a day as I recall. When we took him over I put him on the minimum wage of 30 cents an hour and he does certain work around the station and around the toilets, and Mr. Twomey discussed that with me and I told him that we would fix it by placing him on the $2.59 per day rate so there would be no confliction between the porter-red caps and this position.

Mr. Twomey has called on me in several instances where we have disciplined a man and I have handled it in accordance with the agreement and we have had two such cases that I know of which I expect Mr. Twomey will testify about and then we have one other case—the matron of the station. Of course I am going to argue that point with Mr. Twomey because she is not shown in the scope of the rule, but I suppose before we get through I will have to agree to take care of the situation.

* * * * *

By the Chairman:

Q. There has never been a dispute between the company and any one as to whether that agreement applied to

porters? Has there ever been any doubt about it? Can you give us any light upon that? A. There has not been any doubt about it as far as I am concerned and I do not believe there was any doubt before I came on the property because I have not changed anything in so far as the porter-red caps are concerned as against what it was when I came to the property and I do not know but what the porter-red caps themselves know that the Clerks are representing them because if anything is done, why they go to the Station Master and call his attention to certain rules in this agreement. So, that is prima facie evidence that they are mindful of the fact that this agreement covers their occupation.

Q. Do they have any local representatives? A. This gentleman (indicating Mr. Twomey) is the local representative.

The Chairman: You are the local representative?

Mr. Twomey: I am the local representative on that individual property.

The Chairman: And on the Northern Pacific?

Mr. Twomey: No, just that property.

The Witness: I sometimes wish he was the local representative on the Northern Pacific because then he would not have so much time to bother me.

By Mr. Townsend:

Q. This agreement was consummated July 1, 1921. It was revised August 1, 1924, and a supplementary revision was added August 13, 1925. Mr. Christoffer says that these men are carried on their payroll and reported as porters. The scope rule of this agreement makes no mention of porters. It makes no mention of janitors. A. It mentions laborers in and about the station.

Mr. Townsend: But you are carrying these men as porters on the payroll.

The Witness: We have always figured a porter as a laborer, the same as a janitor. That has been our interpretation of the rule.

* * * * *

By the Chairman:

Q. I am interested in this method of wage payment and why you have paid them ever since 1917 on a monthly basis as distinguished from the system of wage payment that usually applies to so-called red caps, where they have been dependent almost entirely up until recently on gratuities. Why is it that way? A. It is because of the janitor work they did on and about the station. They took care of the lawns and cleaned off the walks; in fact, they did anything we asked them to do in the way of laborer's work.

Q. From your standpoint, they are more in the nature of general purpose employees rather than out-and-out station attendants? A. Yes. I was in the Chicago Union Station in the old station and we have red caps there and they did no work except red capping.

Q. That is just it. Maybe you could, as an expert in these matters, enlighten us on how these employees may, perchance, differ from employees in the Chicago Union Station or, perchance, the Chicago Northwestern Station, to which Mr. Townsend made reference. A. In Minneapolis, in the Milwaukee Station, up to the time they remodeled it, there were, I believe, four red caps that were paid a nominal sum per month. I believe it was twenty-five or thirty dollars. It was their duty to sweep, mop and dust the station—just the station floor—including the women's room and the men's room and then there were, I think, eight other men employed as red caps that received no compensation because they did no work and this situation at St. Paul is so different than it is in any other station in the country that I know of, because they are in reality janitors in addition to their jobs as red caps, because they do anything we ask them to do and they are being compensated for on the basis of the amount of work that they do. For instance, a janitor would be paid, under our agreement, I believe, $3.08 a day.

Mr. Twomey: Janitors in the mail and baggage department get $4.72 a day.

The Witness: I mean janitors up in the station department.

Mr. Twomey: No, I think it is $4.72.

The Witness: Now, based on 50 per cent of the work performed by the red caps being janitor work, that is about half of the janitor's pay and, as I told you, I have tried to find out what was the start of this arrangement, but there is no one around there that seems to have any information as to why they did it.

* * * * *

By the Chairman:

Q. You gave us an indication this morning of what 16 men did and I take it they were regularly assigned to this work. Are there any regularly assigned duties covering each and every one of those jobs? In other words, when a man does a thing that he is required to do, is it spelled out? Is he given definite instructions what to do during the course of the day, or when those jobs are bulletined, is that stated? A. We do not bulletin the jobs as to specific duties, but each man is assigned a certain job; that is, they meet certain trains when they are scheduled. If they are off schedule, the chief red cap or the captain, rather—if this man's train is arriving approximately at the same time that another train is arriving, which he is supposed to meet, then he assigns some one to take care of that.

Then, these duties as janitor are definitely assigned every day, but there are other duties that creep in there that the Station Master notifies the chief or captain to have some one take care of. Something may come up—for instance, some papers or other rubbish has accumulated at the taxi driveway and he assigns some one to take care of that or, if there are certain supplies to get—for example, a case of toilet paper or some other supplies coming into the depot—he will notify the captain and he assigns some one to take care of it.

But as far as the work that I stated, that is taken care of by these positions as assigned every day.

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EDWARD E. TWOMEY

was called as a witness on behalf of the Brotherhood of Railway and Steamship Clerks, was duly sworn, and testified as follows:

DIRECT EXAMINATION

By Mr. Davis:

Q. Please state your name. A. Edward E. Twomey.

Q. What is your present position with the carrier? A. Mail caller.

Q. How long have you been in the service of the carrier? A. Eighteen years this fall.

Q. What is your present position with our organization? A. General Chairman.

The Chairman: General Chairman of what?

The Witness: For the Brotherhood of Railway Clerks on the St. Paul Union Depot Board of Adjustment.

By Mr. Davis:

Q. How long have you been General Chairman of our organization on this property? A. It will be eight years this December.

Q. Since you have held that position, have you been required to familiarize yourself generally with the duties and responsibilities of all the various classifications of employees of our craft and class coming under our schedule? A. Oh, yes.

Q. We have an agreement on this terminal, do we not? A. Yes, sir.

Q. What was the original date of this agreement? A. July 1, 1921, I believe.

Q. Has it since been amended or revised? A. Yes.

Q. Do you recall those dates? A. Well, the next one was—I believe it shows—August 1, 1924, and August 13, 1925, and there are two that are not shown, June 11, I think it is, 1934.

Q. Those were just partial revisions of the agreement? A. Yes—certain rules.

Q. In other words, that agreement has been in effect on this property from July 1, 1921, to date? A. Correct.

Q. From your knowledge, can you say whether or not these porters or so-called red caps involved in this hearing are now and have been covered by that agreement? A. Yes.

Q. Is it your understanding that they have been covered by the agreement since its inception? A. Yes.

Q. Since acting as General Chairman, have you considered that the rules of the agreement apply in every respect to these porters as they do to other employees? A. Yes, sir.

Q. Are the new positions and vacancies of these employees bulletined under this schedule? A. The same as for the other employees.

Q. And the hours of the assignment and Sunday and holiday and overtime rules are equally applied? A. Yes. sir.

Q. Are these employees covered by a seniority roster under our agreement? A. Yes, sir. We have a number of copies for years and my name is shown on them.

Q. Are those roster copies furnished you because you are the representative of the employees on the property? A. As I understand it, yes.

Q. As the General Chairman of our organization on this property, which represents the craft or class of clerical, office, station and storehouse employees, as I understand it, you have always considered that our organization represented these porters, as well as any other groups under that schedule? A. Yes, sir.

Q. Now, this morning, Mr. Twomey, some reference was made to these porters being carried on a separate seniority roster. A. Yes, sir.

Q. Can you recall how many seniority rosters we have on this property under our schedule? A. I think we have seven.

Q. I mean rosters, not districts. How many separate rosters? A. I misunderstood you. In that particular department—

Q. In the whole terminal, approximately how many rosters are there? A. I believe that is what it is.

Q. Seven rosters? A. Yes.

Q. Is there any significance about dividing the craft or class up into these seven rosters, except for seniority purposes? A. None whatever.

Q. In other words, on one roster you may have clerical jobs and on another roster you may have exactly the same type of clerical jobs? A. Exactly.

Q. In other words, roster segregation is a matter of negotiation and is not confined to any particular payroll classification of employees? A. No, sir.

* * * * *

By Mr. Davis:

Q. Now, in your duties as General Chairman, you are familiar, I take it, with the janitor and cleaning work both above and below on the depot property, are you not? A. Yes, sir.

Q. Who takes care of this janitor and cleaning work upstairs or from the ground floor up? A. The porters.

Q. And who does the janitor and cleaning work down below? A. The mail, baggage and milk truckers.

Q. Even though they are not carried on the payroll as janitors, cleaners and porters? A. Yes, sir.

The Chairman: Milk truckers?

The Witness: Yes, sir; the milk truckers in that department. A train may come in with mail, trunks and suit cases, and perhaps a car full of cream and milk and that is picked up by the various milk companies.

By the Chairman:

Q. Where do those men do janitor work when you say "down below"? A. Mr. Chairman, we have what is termed a sub-basement. In that sub-basement is what we call the mail, baggage and milk trucks and there are the locker rooms where the men keep their clothes. There is, perhaps, I would say, in the neighborhood of 215 employees.

Q. Doing that kind of work? A. No, not that many men employed there, but they have that many lockers and you see there is that work to be done.

By Mr. Davis:

Q. I raised that point, Mr. Twomey, to show that even though these people are not carried on the payroll as

janitors and cleaners down below, they actually perform some janitor and cleaning work. A. Yes, sir.

Q. Is not that generally true of a number of classifications? You cannot always tell about the duties and responsibilities of the job by the payroll title? A. That is true.

Q. Now, under our agreement, has it also been your understanding that under Section 5 of Rule 1 the language "laborers employed in and around stations and warehouses" is supposed to cover general laborers around the stations, such as these porters involved in this case? A. Yes, sir.

Q. Is it not a fact that in actual practice and operation, there are any number of differently titled positions admittedly coming under the scope of our agreement whose titles do not appear specifically in the scope rule? A. Yes, sir, and I might give you an example to that effect, Mr. Chairman. Our scope rule covers baggage, mail and parcel room. I myself work in that department. My title is mail caller. That is not shown here in the scope rule and, also in addition to that, there are many other titles that are not shown. There are men who drive Fordson tractors hauling the baggage and mail to and from the trains. They are not shown here although carried on the same seniority roster, and then the title I have given just a moment ago, of trucker. They are not shown. Then there are foremen and also mail, baggage and milk clerks shown in there and various other titles that I know of.

Q. As a matter of fact, I will ask you to turn to the cover page of the agreement and read that. A. "Agreement Between the St. Paul Union Depot Company and Employees Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees."

Q. Now, the intent of that designation is that the agreement covers all of the employees represented by the Brotherhood, irrespective of any particular payroll classification, is it not? A. Yes, sir.

Q. And we have exercised the right to represent the employees of our craft or class of clerical, office, station

and storehouse employees on this property, irrespective of any particular payroll title designation which may or may not appear in the scope rule? A. Yes, sir.

* * * * *

Q. Mr. Twomey, you know it to be a fact that the employees involved in these proceedings have always, as far as you know, had applied to them the rates of pay covered by our wage agreement? A. Yes, sir.

Q. In other words, the various decisions of the United States Railroad Administration, the United States Railroad Labor Board, and the agreements negotiated subsequent to the abolishment of the Labor Board, have been applied to these people just like everybody else under the schedule? A. Yes.

The Chairman: On that score, may I ask if these people got the 5 cent wage increase that resulted from the mediation agreement of August 5, or 7—I forget which?

Mr. Davis: It is August 5.

The Chairman: Yes.

The Witness: Yes.

By the Chairman:

Q. When the clerical people got it, these people got it? A. Yes, sir.

Q. There was no dispute or question about their being entitled to it? A. No, sir.

By Mr. Davis:

Q. Now, Mr. Twomey, even though these colored porters are not, in fact, members of our organization, you consider it your duty, and you exercise that duty, to represent such employees, I understand, because they are part of our craft or class? A. Yes, sir.

Q. Even to the extent of handling any grievances which may arise and which may need handling? A. Yes, sir.

Q. Just the same as you would for some white employee who was not a member of the Brotherhood? A. Yes, sir.

By the Chairman:

Q. Have these individuals made it their business to appeal to you to handle their grievances? A. Yes, sir; many of them have asked about certain rules.

Q. Have you actually adjusted such grievances or claims in behalf of these people? A. They have never presented claims, but I have adjusted things without their asking about them which I thought were in conformity with our rules.

Q. In other words, you see to it that the agreement is lived up to? A. Yes, sir.

By Mr. Davis:

Q. We do not have to have a written claim to correct a violation wherever it may occur in any group?

The Chairman: I understand.

Q. The question was whether or not the adjustment of grievances as far as the Brotherhood and the men locally were concerned, actually functioned. It appears from the record that the conditions spelled out in the record were applied to these colored people and that, I take it, was never questioned and the carrier did not question it, as evidenced by the fact that the 5 cent wage increase granted by the mediation agreement applied also to them. A. Yes, sir.

The Chairman: What I want to know is to what extent the representatives of the Brotherhood police the agreement with respect to these people.

The Witness: Oh, yes. For example, if the seniority roster was not correct—I check that each year as it is issued, with the previous year—I would call the attention of the department head who issued it to that.

The Chairman: As far as these colored red caps are concerned?

The Witness: Yes, sir.

* * * * *

Mr. Davis: In severe cases of discipline—suppose one of these porters would be disciplined: Is it not a fact that, under our rules, if he requested an investigation, the carrier would be required to give him one and you would have to represent him, if he so elected?

The Witness: Yes, sir.

By the Chairman:

Q. Do you actually represent them in hearings? A. In one or two dismissal cases I have. I have made an inquiry as to why the man was taken out of the service.

Q. How recently was that? A. In 1938 we had one case of that kind and I believe we had one case last year.

Mr. Christoffer: They were both in 1938.

Mr. Townsend: Was this as a result of the request from the employee?

The Witness: No, of my own accord, in pursuance of the rules.

Mr. Davis: Is not this the situation, that a very small percentage of the complaints or grievances handled for these porters or other groups are in writing? In other words, a large number of the complaints and grievances are disposed of just in conversation with the heads of the department?

The Witness: Yes, sir.

The Chairman: I understand that. The man first sees his superior if he feels he is being victimized and tries to get that straightened out and if he does not get it straightened out he falls back onto his organization representative. I agree with you that most of the minor differences are handled between the man and his superior.

Mr. Davis: I am talking about when Mr. Twomey came into play. As a matter of fact, not only on this property, but on most properties, particularly where you have the men all at one point or location, a large number of complaints and grievances are disposed of without any written request being made by the individual or the chairman representing them.

The Chairman: Without formal intervention?

Mr. Davis: Yes, and it is only in cases that we cannot bring about a prompt disposition by personal representation that we get on the record.

* * * * *

By Mr. Davis:

Q. Mr. Twomey, under what general supervision are these porters? Are they under the Station Master's general supervision? A. I would say they are under the Assistant Station Master.

Q. In other words, they are in the station department? A. Yes, sir.

Q. And they are unquestionably station employees? A. Yes, sir.

Q. And also under that same supervision are the gatemen? And train announcers? A. Yes, sir.

Q. And telephone switchboard operators? A. Yes, sir, telephone switchboard operators and elevator operators.

Q. How about the matrons? Are they under the same supervision? A. Yes, sir.

Q. They are also colored employees? A. Yes, sir.

Q. And also come under the agreement even though not specifically mentioned in the scope rule? A. Yes, sir.

Q. The same supervision, then, in the entire department, is exercised over all the seniority rosters in that particular department? A. Yes, sir.

Q. And the whole operation there is correlated work— A. That is right.

Q. —of the various groups? A. Yes, sir.

Q. When the railroads in 1938 instituted the request for the 15 per cent reduction in rates of pay of all the railroad employees, and served notice on you as the chairman of our organization in the depot, did you consider that that 15 per cent reduction request also embraced and covered these porters? A. Yes, sir.

Q. Well, if, in the final handling of that wage reduction request, the railroads had been successful in obtaining the decrease, would that have been applied to these porters, the same as the clerks? A. I believe it would.

Q. But the request was withdrawn as the result of the Emergency Board decision? A. Yes, sir.

* * * * *

By Mr. Davis:

Q. So far as you know, Mr. Twomey, there is no complaint about representation of any of the other employees of our craft or class on this property besides these particularly involved porters, is there? A. No, sir.

Q. You have always exercised your right of representation over the entire craft and the management has always recognized your right to so represent them? A. Yes, sir.

Mr. Davis: That is all I have to ask.

* * * * *

Q. You have seen this agreement in practice and in operation virtually for all of its life except the year or so before you came there? A. Yes, sir.

Q. And it is your impression that the agreement has always applied and has been recognized as applying to these so-called porters? A. Yes, sir.

Q. Now, tell me about the work. You testified that underneath, the people that did the handling of the mail and handling of milk, etc., did the incidental janitor work that resulted in this place where they worked, and I understand these janitors and red caps do the janitor work upstairs. Are there any other people employed as straight-out janitors? A. No, sir, I do not believe there is. There is one elderly gentleman who puts in the greater part of his time doing janitor work.

Q. Is he one of these people? A. No, sir; he is in the basement. He helps out where there is a considerable rush in the baggage, but otherwise he devotes most of his total day to janitor work.

Q. Do they have any group of women come in at night to clean out the offices?

Mr. Christoffer: These 5:30 men that I told you about—they come in and go right up and clean out the offices and come down about 7:00 o'clock and do their red cap work.

The Chairman: I understood somewhere in the record there was testimony to the effect that one of the men relieved one of the elevator operators.

The Witness: Yes, sir.

Mr. Christoffer: We spell them about 45 minutes a day.

The Chairman: What about cleaning windows, etc.?

Mr. Christoffer: The higher windows we contract to a window cleaning company.

The Chairman: You use experts on them?

Mr. Christoffer: Yes, sir. They do the higher windows and the concourse windows they take care of because of the fact there is an injury liability there which we do not care to assume.

The Chairman: Well, Mr. Townsend, have you any questions?

Mr. Townsend: Yes, sir.

By Mr. Townsend:

Q. Mr. Twomey, you have been General Chairman of the Clerks on the St. Paul Union Terminal Company property for eight years? A. Eight years this fall.

Q. Did you know that the men had applied to this organization for membership? A. Well, they talked about it many times.

Q. Is it not true that these two men that were discharged in 1938 were not called in for a conference to determine whether it was justifiable or not? A. To the best of my knowledge, they never asked for it. It was required in the rules that if he asked for it, he would have to have it.

Mr. Christoffer: The individuals did talk to me.

The Chairman: They did?

Mr. Christoffer: One did and the other sent a man to see me. One of the individuals came to talk to me and I told him if he wanted an investigation he should bring in his representative and we would set a date for it.

* * * * *

WILLIAM M. DAVIS

was called as a witness on behalf of the Brotherhood of Railway Clerks, was duly sworn, and testified as follows:

DIRECT EXAMINATION

The Witness: My name is W. M. Davis. I am assistant to the Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, with my headquarters being located at 701 Brotherhood Building, Cincinnati, Ohio.

I have been in railroad service in various clerical positions on various railroads since 1915, during which time I also served in various capacities with the organization which I now represent, I have held the present position with our organization on the staff of the Grand President since about six and a half years ago.

In that position, I have jurisdiction over the wages and working conditions agreements of our organization throughout the country, and as such, I am very familiar, of course, with the coverage of our agreements generally and the duties and responsibilities of the various types of employees embraced within the scope of our agreements.

It will no doubt be recalled that during Federal control, our organization entered into a national agreement with the Director General of Railroads covering our craft or class of clerical, office, station and storehouse employees. That agreement became effective January 1, 1920, and continued in effect until it was abrogated by Decision No. 119 of the old United States Railroad Labor Board on July 1, 1921.

The scope rule of the national agreement reads:

"Employes affected. Rule 1. These rules shall govern the hours of service and working conditions of the following employees on railroads in Federal operation subject to the exceptions noted below:

"(1) Clerks.

"(2) Other office and station employees, such as office boys, messengers, chore boys, train announcers, gatemen, checkers, baggage and parcel room employees, train and engine crews callers, operators of office and station equipment devices, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors.

"(3) Laborers employed in and around stations, storehouses and warehouses."

Now, among the exceptions to that scope rule is this particular exception which I quote:

"Individuals performing personal service not a part of the duty of the carrier, such as 'red caps,' travellers' aides, etc."

Under application of that scope rule, our national agreement did not cover the so-called red caps where their duties were not considered to be a part of the carrier, but where their duties included work, such as janitor, porter and station cleaning work, which were duties admittedly a part of the service or duty of the carrier, the scope rule of our agreement covered such employees, as is evidenced on this particular carrier by the fact that this agreement covered these employees during the time it was in existence on this property.

After Federal control, which terminated with the enactment of the Transportation Act of 1920, the Railroad Labor Board was established to dispose of disputes arising out of agreement changes and grievances or concerning the application and interpretation of agreements.

Shortly after the termination of Federal control, the carriers throughout this country served notices on the various organizations, particularly those who held national agreements during the Railroad Administration, of a desire to terminate or revise said agreements and, pursuant to the provisions of the Transportation Act, conferences were held between representatives of the employees and the carriers and those disputes were generally referred to the Labor Board for determination.

Eventually, disputes between our organization and practically all the carriers of the United States reached the Board and the Board, in its Decision No. 119, decided that the national agreement should be abrogated, effective July 1, 1921, and outlined a procedure for resumption of conferences by the representatives of the employees and the carriers to endeavor to negotiate new agreements on each property in lieu of the national agreement, with the provision that if agreement could not be reached, the dispute may be referred to the Labor Board for further handling.

In Decision 119, particularly Exhibit B thereof, the Labor Board laid down certain principles under which these negotiations would be conducted between the carrier and representatives of the employees. One of the most important of those principles is known as Principle 15, and for the benefit of the record, I desire to read that Principle.

"The majority of any craft or class of employees shall have the right to determine what organization shall represent the employees of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the rights of employees not members of the organization representing the majority, to present grievances either in person or by representatives of their own choice."

Under that Principle, our committee met the representatives of the St. Paul Union Depot Company and negotiated, effective July 1, 1921, the present agreement now held between our organization and the carrier covering the employees of our craft or class which we then and still represent, included among which were the so-called red caps or porters or janitors.

All during this period of years, these porters have been considered, and have actually been, a component part of our craft or class. What we think now, is simply this, that the applicant organization is simply trying to carve out a new or heretofore unrecognized class or craft on this property from an already existing craft or class of clerical, office, station and storehouse employees. I have given you that history of our agreement relationship on this carrier, thinking perhaps it would be beneficial to the record.

Now, as I have heretofore pointed out, under the national agreement, red caps, as such, who were not performing service a part of the duty of the carrier, were not considered as coming under our scope rule and were excepted therefrom. That same line of demarcation was on most carriers continued as the result of the decision issued by the United States Railroad Labor Board on the rules and agreements in dispute which came up to the Board from its abrogation of the national agreement under Decision No. 119.

The Board, effective February 1, 1922, issued its Decision No. 630. Rule 1 of that Decision reads:

"This rule shall govern the hours of service and working conditions of the following employees subject to the exceptions noted below:

"(1) Clerks.

(a) Clerical workers.

(b) Machine operators.

"(2) Other office and station employees—such as office boys or messengers, chore boys, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, operators of certain office or station appliances and devices, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors.

"(3) Laborers employed in and around stations, storehouses and warehouses."

And under the exceptions to that rule, we find this language:

"Individuals performing personal service not a part of the duty of the carrier."

Quite generally, after the issuance of that Decision, which embodied that scope rule, most of our agreements with the carriers contained some exceptions with respect to individuals performing personal service, but I desire to particularly point out that our agreement under the St. Paul Union Depot did not contain any such exception with respect to red caps and such individuals, because these people were actually employees, admittedly such, and a part of our station employees on this property.

Now, it has been said here that this is a rather particular situation on this particular property. I want to say that in some of our other agreements practically an identical situation exists. On the Union Pacific, for instance, such employees as these involved have always been under our agreement and paid substantial rates of pay and they perform what is generally termed a red cap service incidental to the other service they render the carrier. On the Louisville & Nashville, these so-called porters or baggage porters are all interwoven with our other station forces. The work is not segregated, and they are covered by our rates of pay applicable to these employees and they have lost any identity as to any so-called red caps.

On certain other properties a similar situation prevails.

The Chairman: Will you give us just what those properties are?

The Witness: I cannot bring it to you definitely. I will give it to you in this way, Mr. Beyer:

At a number of the larger terminals it is true that there is sufficient so-called red cap work where the line of demarcation is plain and a number of people perform nothing else but so-called red cap work, but as the size of the station and operation dwindles, and we get out along the line of road, we find there is not sufficient actual so-called red cap work for one or more employees to devote their entire time to it, and here is the picture: We have station porters, station janitors, and at some places freight handlers, laborers and truckers, who, in addition to performing the work usually performed under their own classifications, put on a red cap and sometimes without a red cap on their head, go out and handle passengers' baggage on and off trains as the occasion demands. They are on full time pay with these carriers, under agreements.

We have always held and maintained, and maintain here, that where our agreements cover porter and janitorial and cleaning work, that such work belongs to the employees embraced in our agreements and that it would be a violation of our agreements for the carriers to permit some outside employees or craft or class to perform that service and generally that is the reason why, generally, red caps, as the term is understood, are not permitted to do work belonging to people under our agreement. There are some few exceptions to the rule.

We have been involved on other properties in representation disputes, involving red caps, where our own organization had been certified as the representative and on those properties the red caps have been determined to be a separate class or craft. Why? Because their work was confined exclusively to so-called red capping and they do not perform the work of any other employees under the general agreement.

I cite Case R-107, involving the Kansas City Terminal, where we held two separate agreements, one covering our craft or class and the other the red caps.

The Chairman: How are the duties of the red caps defined there or understood on the Kansas City Terminal?

The Witness: I have that agreement here.

The Chairman: Let us have that, please.

The Witness: Let me see if I can find it. Over on this property, our agreement covering these so-called red caps, became effective April 5, 1939, and because of the pending situation involving the application of the minimum wage provision of the Fair Standards Act, the carrier was unwilling, even in the face of ICC Decision Ex parte 72 (1) to classify these people as, or to use them and call them, employees. Anyhow, we got around that by simply calling them ushers and the scope rule of that agreement says:

"These rules shall govern the hours and working conditions of ushers in the Kansas City Union Station" and that is the extent of the description of the work. They are ushers and the work they perform is work that did not theretofore come under our general schedule. In other words, the payroll designation is generally understood to define the work when no actual definition exists.

In addition to the Kansas City Terminal case, we have recently been certified in Case R-585, as the representative of the so-called red caps on the Missouri Pacific, and in that connection, nobody who performed service under our general agreement participated in that election. Incidentally, the International Brotherhood of Red Caps was a party to that dispute.

We have recently been certified in Case R-590 on the Delaware, Lackawanna & Western, and in that case a list of eligible employees was prepared from employees who were not under our agreement and who did not perform work under our agreement. In other words, anybody who was on the payroll under our wage agreement or working conditions agreement, or performed work under that agreement, was excluded from the list of eligible voters.

On the B. & O. Chicago Terminal, in Case R-563, our organization was also certified as the representative of the so-called red caps and when the Mediator was on the property investigating the dispute, an agreement was reached between the representatives of the organization involved as

to a list of eligible voters, and excluded from that list was any employee who might be performing janitorial or porter service and who was under our agreement.

The Chairman: Have you an agreement with the B. & O. Chicago Terminal?

The Witness: The agreement is now in negotiation.

Now, our organization, on the Terminal Railroad Association of St. Louis and the Denver Union Terminal also represents the red caps without the necessity of obtaining certification. The same applies to the Jacksonville Terminal, the Dallas Union Terminal, the Wichita Union Terminal, the Atlanta Terminal Company, the Central Railroad of New Jersey and the L. & N.

We have been involved, either directly or indirectly, in representation disputes with the International Brotherhood of Red Caps, first, on the New York Central, which is covered by certification of this Board R-557, and in connection with that dispute, I desire to point out that the scope of it covered not only the New York Central proper but its subsidiaries, the Big Four and the Michigan Central. In the compilation of the list of eligible voters by the Mediator in that case, employees who were performing janitorial or cleaning work or other work under our agreement were eliminated from the list of employees.

The Chairman: That was done by agreement between the parties?

The Witness: I am getting ready to read into the record a letter addressed to Mediator O. F. Carpenter, by John R. Lee, Chairman of the Red Caps. That letter reads as follows:

"In view of the fact that investigation of this case R-557 by the National Mediation Board has shown that the classification of employees of the New York Central Railroad Company known as Ushers, Station Porters and Station Attendants, as of this date, perform duties other than those involved in assisting travelers with their hand baggage and other articles and personal service in transit, therefore, I wish to state in behalf of the International Brotherhood of Red Caps that it waives all claims to the representation of said Ushers, Station Porters and Station Attendants.

"In view of the overlapping of red caps with janitor service and train calling at certain stations, I wish to repeat in behalf of my organization that the International Brotherhood of Red Caps makes no claim to janitor services or train calling and will not seek to represent employees engaged in such service.

"My organization is willing to accept as the eligible list the names listed by the carrier as red caps, red cap porters and attendants."

That letter was dated September 2, 1939.

When the representative of the International Brotherhood of Red Caps waived all claim to employees covered by our schedule, our organization got out of the picture and exactly the same thing happened on the Big Four and Michigan Central units of the New York Central.

Likewise the same situation occurred in the representation disput R-558, handled on the Cleveland Union Terminal Company, which was also a subsidiary of the New York Central. I read into the record a letter dated August 15, 1939, addressed to Mediator O. F. Carpenter by General Chairman William J. Winston on that property.

"Referring to our conference with respect to the dispute concerning the question of representation raised with your Board by the International Brotherhood of Red Caps covering certain employees employed at the Cleveland Union Terminal, Cleveland, Ohio.

"Please be advised that after a careful perusal of the list of employees excluded from this case as well as copy of Mr. Prayier's (Vice President of the International Brotherhood of Red Caps) letter addressed you under date of August 14, 1939, wherein he waived all claims to all positions at the Cleveland Union Terminal now covered by our agreeement, thereby leaving only red caps or station porters to be considered.

"Being satisfied that our interest with respect to classification having been protected, we are, therefore, withdrawing our organization from this dispute, which is covered by your Case No. R-558."

I do not have a copy of the letter to which Mr. Winston refers, but it is undoubtedly in the files of your Board and will be self-explanatory.

Now, recently, on the Milwaukee a dispute arose over the so-called red caps, covered by the Board's R-662. On that particular property we became involved in it because, at first, it was claimed that a number of people under our agreement belonged in the craft or class of so-called red caps, but when the Mediator got on the property and the parties got together, the representative of the red caps agreed to an eligible list including only red caps at Minneapolis, Milwaukee and Sioux City. Those were the employees whose work was confined exclusively to the so-called handling of passengers' baggage to and from trains, etc. In other words, elsewhere on the system employees who performed the red cap service as a portion of their daily assignments and who were under our schedule and covered by our agreement, were eliminated from the list of eligible voters and not considered eligible to participate in that particular representation dispute.

On the Pennsylvania and Reading Seashore Lines, when we were advised that the International Brotherhood of Red Caps had invoked the services of the Board covering representation of red caps on that property, after making an investigation, we advised the Board, under date of June 16, 1939, as follows, and I will quote the last two paragraphs of that letter:

"My investigation of this matter indicates that our agreement with the carrier covers passenger station laborers and/or porters, janitors, etc., but that employees, commonly known as red caps, are not covered by our agreement.

"Accordingly, if it is intended by the International Brotherhood of Red Caps to embrace in their invocation only those employees commonly known as red caps and not to embrace in their invocation employees such as station porters and/or laborers now covered by our existing agreement with the carrier and constituting a component part of our established craft or class of clerical, office, station and storehouse employees, then this is to advise you that our organization is not, at this time, interested in this dispute."

After that happened the Board went ahead and disposed of the dispute, confining the list of voters to people not covered by our agreement.

Exactly the same type of letter and the same situation applied in R-541 on the Pennsylvania Railroad property.

Now, in Case R-572, on the Texas & New Orleans Railroad, which is a Texas and Louisiana line of the Southern Pacific, we were indirectly involved in a representation dispute involving red caps on that property and, after investigation on our part, we advised the National Mediation Board, in our letter of August 28, 1939, in part, as follows:

"My investigation of this matter develops that in recent representation election conducted by your Board on this property, Case R-555, the Station Porters participated and voted as a part of the craft or class of Clerical, Office, Station and Storehouse Employees, but that the red caps were not included in the list of eligible employees and did not participate in the election for the reason that they were not covered by the provisions of our current working agreement on the property, and for the additional reason that they did not constitute a component part of our craft or class of employees on this property.

"My investigation further develops that a large majority of the strictly red cap employees on this property have signed authorizations for representation by our organization and that under date of August 9, 1939, our representative addressed the carrier as per copy of letter attached, advising it of this fact.

"Obviously there is no bona fide representation dispute involving station porters on this property for such employees are and have always been recognized as a part of the craft or class of clerical, office, station and storehouse employees, and their status was officially determined recently by your Board when it issued certification in Case R-555. We therefore protest the inclusion of these station porters in any investigation which may be conducted by your Board pursuant to the instant invocation and we challenge the right of any other organization to represent the strictly red cap employees in this property. If the instant invocation is considered by your Board in its present form, or as it may be amended, we would appreciate your advice to that effect and desire to be notified as an interested party of the assignment of a mediator or any in-

vestigation made by your Board concerning the matter."

Thereafter the Board proceeded to assign a mediator and a list of eligible voters was prepared and it did not include any employees covered by our general schedule. Before the vote, however, was taken, my file reflects that our representative on the property withdrew the Brotherhood from participation in the election covering the strictly red cap employees and the certification was later issued. It covered only strictly red cap employees.

On the Rock Island, in Case R-550, involving the representation of red caps, in which the International Brotherhood of Red Caps was not involved, but our organization was, with an organization known as the Chicago Railway Depot Ushers' Union, when the Mediator was assigned to investigate the dispute and representatives of the two organizations got together, it was definitely and specifically decided to eliminate from the list of eligible voters any employees on the property who were admittedly under our agreement or who performed work under our agreement.

I read now into the record letter of July 24, 1939, addressed to Mediator Carpenter, by General Chairman J. Y. McLean of our Brotherhood.

"With reference to Case No. R-550:

"Our Brotherhood has no desire to attempt to deny these employees representation it is evident they desire, and we hereby respectfully request a withdrawal of any intervention on the part of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, with the exception of such employees located at Englewood Passenger Station.

"We ask the exclusion of employees at Englewood Station for the reason they are not of the same general class as others listed in this controversy. These employees at Englewood Station have been represented by our Brotherhood for years and have enjoyed an interlocking seniority status with baggage checkmen, baggage handlers and information clerks. Their seniority rights have been established and they are by nature of their employment from time to time a part of the regular force clearly covered by our working rules agreement with the carrier."

There again, where it was definitely shown that employees were under our working agreement and performed work coming under that agreement, they were removed from the list of eligible voters from participation in the voting covering the so-called red caps.

Now, on the Jacksonville Terminal, as I mentioned a while ago, we represent the red caps by virtue of negotiations with the management and without the necessity of securing a certification from the Board. Rule 1 of our red cap agreement on that property says:

"These rules shall govern the hours of service and working conditions of all red caps, red cap captains and all other employees handling hand baggage not already covered by agreement."

In other words, we took under this separate agreement all employees who were not under our general agreement on that property.

Now, in addition to that, Mr. Chairman, we have a record of certifications being issued by your Board on other properties, involving red caps, that I can list if you want me to, or I can leave out.

The Chairman: Let us list them.

The Witness: R-171, Washington Terminal Company.

R-230, Southern Pacific (Pacific Lines).

R-537, Chicago and Western Indiana.

R-542, Northern Pacific Terminal Company of Oregon.

R-540, Cincinnati Union Terminal.

R-551, Illinois Central.

R-561, Indianapolis Union.

R-562, Memphis Union Station.

R-567, Houston Belt Terminal.

R-577, Union Depot of Columbus, Ohio.

R-581, Florida East Coast.

R-603, Ogden Union.

I believe I have already mentioned R-622 on the Milwaukee.

As far as we are able to ascertain, and our records indicate, although we were not directly involved in these particular disputes, the employees involved were not performing any janitorial or cleaning work or work coming under the scope of our agreement on those properties.

By the Chairman:

Q. Is the class or craft that you commonly represent on those properties being represented by your organization on those properties? A. That is right—the clerical, office, station and storehouse employees.

Q. Your organization represents those employees on each of the carriers we have listed here? A. Yes.

Q. The Washington Terminal and Central of New Jersey? A. Yes, sir.

Q. The Chicago Terminal and the Cincinnati Union Terminal? A. Yes, sir.

Q. The Pennsylvania Railroad and the Pennsylvania and Reading? A. Yes, sir.

Q. Illinois Central? A. Yes, sir.

Q. Indianapolis Union Terminal? A. Yes.

Q. Memphis? A. Yes, sir.

Q. The Houston Belt Terminal? A. Yes.

Q. The Columbus Union Station? A. Yes.

Q. The Florida East Coast? A. Yes.

Q. The Ogden Union? A. Yes.

Mr. Townsend: You do not represent the red caps?

The Witness: No; we represent the craft of clerical, office, station and storehouse employees.

* * * * *

Under the constitution and laws of our organization, colored employees are not eligible to membership. On most properties we have put into effect an arrangement whereby such employees who are part of our craft or class and are covered by agreements, are organized into independently chartered locals of the American Federation of Labor, which affiliate with our general committees or boards of adjustment, and we permit that, under our law, on the property and, through such affiliations, the colored representatives of these A. F. of L. locals are accorded representation in the matter of grievances and disputes involving interpretations of rules just the same as though they were members of our Brotherhood. We are fulfilling our obligation under the law in that respect, even though colored employees cannot now become members of our Brotherhood.

The same thing applies to any white employee who is not a member of the Brotherhood, with respect to coverage of the agreement. They are bound by the agreement, even though they are not members.

* * * * *

Further in that connection, Mr. Chairman, I overlooked further advising the Board that our last convention at Toronto, Canada, authorized our Grand Executive Council to develop ways and means for a closer and better functioning as the representative of our craft or class of employees, particularly those of the craft or class who are colored. As you know, not only among station employees, but freight handlers and other employees, there are a large number of colored employees in our craft or class and under our agreements and our Council is now permitted, and we hope to institute it within a reasonable time, an auxiliary of our organization, a part and parcel of our organization, wherein colored employees of our craft or class and those covered by our agreements, may become members of that auxiliary and their affairs be handled exactly in the same manner as our own lodges' affairs are now handled.

* * * * *

FINDINGS OF FACT

This cause of action originated under rights accruing to the plaintiffs, a voluntary unincorporated association and individuals, suing in a representative capacity for persons known as "red-caps" in the employ of the Saint Paul Union Depot Company, and complaining of the failure of the National Mediation Board, defendant, to designate the plaintiff association as their bargaining agent with the said Saint Paul Union Depot Company. It was stipulated between counsel representing all parties in interest, including the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, individually and as Grand President of the said Brotherhood, allowed to intervene in the said cause, that the typewritten record taken before the Mediation Board in its case No. R-635, with exhibits thereto, should be considered as evidence in the instant cause, and as such taken into consideration by the court in passing upon the questions involved. With the evidence thus before it, and considering the arguments of counsel for the respective parties, the court finds as a fact as follows:

1. "Red-caps" constitute a separate craft or class for bargaining purposes and the individual plaintiffs in this cause were "red-caps" in the employ of the Saint Paul Union Depot Company; and in said capacity unanimously invoked the services of the National Mediation Board in keeping with the terms of the Railway Labor Act.

2. The individual plaintiffs, "red-caps" in the employ of the Saint Paul Union Depot Company, did not and could not belong to the intervening Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; and they had not designated the said Brotherhood as their bargaining agent, nor was the said Brotherhood as a matter of fact their bargaining agent.

3. The preponderance of service by the individual plaintiffs, in their representative capacity, was that of "red-caps" and entitles them to be so designated.

4. A dispute as to representation did as a matter of fact exist between the United Transport Service Employees of America and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees at the time the services of the National Mediation Board were invoked.

July 6th, 1942.

Daniel W. O'Donoghue,
Justice.

CONCLUSIONS OF LAW

Based upon the Findings of Fact filed in this cause the court concludes as a matter of law, as follows:

1. The "red-cap" employees of the Saint Paul Union Depot Company are not a part of the craft or class of clerical, office, station and storehouse employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; but represent a separate and distinct class or craft.

2. As a separate and distinct class or craft the "red-caps" of the Saint Paul Union Depot Company are entitled to designate a bargaining agent in keeping with the terms of such privilege granted in the Railway Labor Act.

3. The Order of Dismissal of Case No. R-635 entered by the Mediation Board failed to recognize the "red-caps" employees of the Saint Paul Union Depot Company as a separate class or craft and accordingly failed to recognize the existence of a dispute as to representation of such character as it should properly have taken cognizance of, and by so much violated the rights of said "red-caps," and should be held to be void and ineffective.

4. It being conceded that the "red-caps" in the employ of the Saint Paul Union Depot Company unanimously indicated their desire to have the United Transport Service Employees of America act as their bargaining agent with the said Saint Paul Union Depot Company under the terms of the Railway Labor Act, and it having been found that the said "red-caps" employees represent a separate and distinct class or craft for such purposes, the National Mediation Board should certify the said United Transport Service Employees of America as the bargaining agent for the "red-caps" of the Saint Paul Union Depot Company.

July 6, 1942.

Daniel W. O'Donoghue,
Justice.

JUDGMENT

This cause coming on to be heard upon the complaint of the plaintiffs, the answer of the defendant, the National Mediation Board, and the answer of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, individually and as Grand President of the said Brotherhood, intervenors in this cause, and upon stipulation of counsel for all parties in interest that the evidence before the court for consideration was to be stenographically transcribed record of testimony previously taken, with exhibits, before the National Mediation Board, and upon argument of counsel for the respective parties, it is, by the court, this 6th day of July, A. D. 1942:

Adjudged, ordered, and decreed: That the Order of Dismissal of Case No. R-635 by the National Mediation Board be and it hereby is held to be void and ineffective.

And it is further adjudged, ordered, and decreed: That the "Red-caps" of the Saint Paul Union Depot Company, as a separate and distinct class or craft and not as being a part of the craft or class of clerical, office, station and storehouse employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees are entitled to designate their bargaining agent under the terms of the Railway Labor Act, which right they have exercised by designating the United Transport Service Employees of America as such bargaining agent.

And it is further adjudged, ordered, and decreed: That the National Mediation Board be and it hereby is required to certify the said United Transport Service Employees of America to the Saint Paul Union Depot Company as the bargaining agent for the "red-caps" in the employ of said Saint Paul Union Depot Company by reason of the unanimous request of said "red-caps" that the said United Transport Service Employees of America should be so designated.

Daniel W. O'Donoghue,
Justice.

[fol. 79] Thursday, June 17th, A. D., 1943.

* * * * * * *

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller, Associate Justice, and Honorable Edward C. Eicher, Chief Justice, District Court of the United States for the District of Columbia.

* * * * * * *

No. 8374

Brotherhood of Railway and Steamship Clerks, Freight Handlers &c., et al., Appellants,

vs.

United Transport Service Employees of America, in Its Own Right &c., et al., Appellees

Argument commenced by Mr. Willard H. McEwen, attorney for appellants, and concluded by Mr. James A. Cobb, attorney for appellees.

[fol. 80] United States Court of Appeals for the District of Columbia

No. 8374

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, Individually and as Grand President of the Brotherhood of Steamship Clerks, Freight Handlers, Express and Station Employees, Appellants,

v.

United Transport Service Employees of America, in Its Own Right and as the Actual and Legally Designated Representative of the "Red Cap" Employees of the Saint Paul Union Depot Company, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

Argued June 17, 1943. Decided August 2, 1943

Mr. Willard H. McEwen, with whom Messrs. Edward C. Kriz and Frank L. Mulholland appeared on the brief, for appellants.

Mr. James A. Cobb, with whom Messrs. Perry W. Howard and George E. C. Hayes appeared on the brief, for appellees.

Before Groner, C. J., Miller, Associate Justice, and Eicher, Chief Justice of the United States District Court.

EICHER, C. J. District Court:

This appeal calls for the interpretation of the collective bargaining mechanics of the Railway Labor Act.

About 45 station porters (red-caps) in the employ of the Saint Paul Union Depot Company, Saint Paul, Minnesota, after organizing as a local chapter of the appellee, the United Transport Service Employees of America, (hereinafter called "United") a labor union composed of "Red-Cap" employees of various railroads and terminal stations throughout the United States, applied to their employer for the execution of a working and wage agreement, and joined with "The United" in requesting recognition of "The United" as their bargaining agent. Upon refusal, first on the ground that "Red-Caps" were not regarded as "employees" by the Interstate Commerce Commission, and later because the rights of the "Red-Caps" were covered by a previously executed working agreement with the appellant, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, (hereinafter called the "Brotherhood") the services of the National Mediation Board (hereinafter called the Board) were invoked to investigate the dispute over said representation. The Board dismissed the application on the ground that station porters "are part of the craft or class of clerical, office, station, and storehouse employees and not a separate class or craft for the purposes of the Railway Labor Act" and that "No dispute over representation has been [fol. 81] found by the Board to exist among the craft or class of * * * (such) employees in the service of the company."

This action, brought by United and five of the employees suing as representatives of the others, similarly situated, to review said dismissal order, followed, the Brotherhood intervening as a defendant. The Court below granted the relief prayed for, and adjudged the dismissal order of the Board to be void and ineffective, the "Red-Caps" to be a separate and distinct class or craft, and required the Board

to certify the appellee, "United", to the Saint Paul Union Depot Company as the bargaining agent for the "Red-Caps" in its employ.

From said judgment the Board perfected no appeal, and the intervening Brotherhood is the sole appellant. In *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 66 App. D. C. 375, we also reviewed an order of the Board, and here as there the question is "whether the decision of the Board * * * was a mistake of law so clearly erroneous as to make the decision arbitrary."

Before considering the statute, we deem it appropriate to summarize some conceded facts:

(1) The working agreement entered into in 1921 between the Saint Paul Union Depot Company and employees represented by the Brotherhood did not list station porters or "Red-Caps".

(2) As late as 1938 the General Superintendent of the Depot Company took the position that the Saint Paul "Red-Caps" were not employees within the terms of the Railway Labor Act because they had not yet been held by the Interstate Commerce Commission to be employees.

(3) After they were held by the Interstate Commerce Commission to be employees the Depot Company took the position that the "Red-Caps" were covered by the working agreement with the Brotherhood entered into in 1921.

(4) The Saint Paul "Red-Caps" have at no time designated the Brotherhood as their bargaining agent, but have in fact unanimously so designated the United.

(5) The Board has recognized the United as craft organization acting for "Red-Caps" either by actual certification to, or through knowledge of executed agreements with upwards of twenty-one railroads and station companies.

(6) The Board found that the Saint Paul "Red-Caps" devote a preponderance of time to "red-cap" or station porter service as distinguished from janitor or custodial service.

(7) The Saint Paul "Red-Caps" are all colored and because of this are not eligible for membership in the Brotherhood.

(8) No election has been at any time held at which the Saint Paul "Red-Caps" have had the opportunity to vote for a bargaining agent.

Turning to the controlling statutory provisions, we quote from the Railway Labor Act, as follows: From U. S. C. A., Title 45, Sec. 152, fourth paragraph,

[fol. 82] "Employees shall have the right to *organize and bargain* collectively through representatives *of their own choosing.* The majority of any craft or class of employees shall have the *right to determine* who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall *deny or in any way question the right* of its employees to join, organize, or assist in organizing *the labor organization of their choice,* and it shall be unlawful for any carrier to *interfere in any way* with the organization of its employees. * * *" [Emphasis supplied]

From Section 152 aforesaid, Ninth paragraph:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees *designated and authorized in accordance with the requirements of this chapter,* it shall be the duty of the Mediation Board * * * to investigate such dispute and to certify * * * the name * * * of the * * * organization * * * designated * * *. * * * In such an investigation the Mediation Board shall be authorized to take a secret ballot of the employees involved or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as will insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier." [Emphasis supplied]

From Title 45, aforesaid, Section 151, Fifth paragraph:

"The term employee as used herein, includes every person in the service of the carrier * * * who per-

> forms any work defined as that of an employee * * *; in the orders of the Interstate Commerce Commission * * *; Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to *define the crafts* according to which railway employees may be organized *by their voluntary* action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way *limited or defined by the provisions of this chapter,* or by the orders of the commission." [Emphasis supplied]

It will be observed that Congress granted employees certain positive rights, both affirmative and negative in character. They have the right to organize *and* bargain collectively through representatives of their own choosing, which carries the corollary that the right to organize is essential to the right to bargain collectively. And yet the employees in the case at bar are ineligible to organize with the only labor union that their employer will recognize as their bargaining agent. Again, the majority of any craft or class shall have the right to determine who shall be their representative, which means the majority of the votes cast at an election, provided a majority of those eligible to vote have participated. (*Virginian Ry.* v. *System Federation,* 300 U. S. 515). Clearly, this implies a right in each employee to participate as a member of a craft or class, in such determination. But the employees in the case at bar have had their representative designated for them by their employer without even the opportunity to exercise the right [fol. 83] of being in the minority or to fail to vote if they should so choose. Still again, employees have the right to be in no way questioned in their choice of labor organization. The employer's refusal in this case to deal with the only labor organization these employees could join and that they did designate as their representative certainly violates both the spirit and the letter of the Fourth paragraph of Section 152.

Following such refusal and when the powers of the Mediation Board are invoked, we find in the Ninth paragraph of Section 152 that the mediation duties imposed on the Board are directed to "disputes * * * as to who are the representatives * * * designated and authorized *in accordance with the requirements of this chapter.*"

Thus the Mediation Board is enjoined to perform its duties in the light of all rights, express or implied, that are preserved to employees by the Act. A further significant directive to the Board is found in the Fifth paragraph of Section 151 where it is declared that even an order of the Interstate Commerce Commission shall be given no weight in defining "the crafts according to which railway employees may be organized *by their voluntary action.*"

We are convinced that the Mediation Board, when its good offices were invoked in this case, was called upon to do more than to reach a decision on a mere issue of fact, which, if supported by evidence, would be conclusive upon the Courts. To say in a vacuum that the Saint Paul "Red-Caps," historically or by definition or both, belong to the same craft or class as station laborers, even tho' less than half of their time is devoted to janitor or custodial work, is one thing. To say it in the light of the resultant deprivation of rights preserved to them by the statute, is quite another thing. It is a mixed question of law and fact that presents itself for solution. If the factual decision arrived at is found to be contrary to law, it is the duty of the Courts so to declare.

In *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 66 App. D. C. 375, while conceding the Board's large discretionary powers in the conduct of elections for the appointment of representatives between the carrier and the craft, this Court said (page 379): "If the matter of intent alone is to be adopted as the test, we should hesitate to hold that an emergency conductor whose service time on the railroad is spent 50 per cent as conductor and 50 per cent as brakeman should not be classified, for the purposes of agreement making, as a conductor." This observation is pertinent to the conceded fact in the case at bar that the preponderant service of the employees was as "Red-Caps" or station porters.

The opinion of this Court in *National Federation of Railway Workers* v. *National Mediation Board*, 71 App. D. C. 256, is without bearing on the issue presented to us in the instant case. The coach cleaners there concerned were deprived of no statutory rights, by either the government or their employers. The designated representative, it is true, was a labor organization to which some of the coach cleaners could not belong, but it became the designated representative because a majority of the coach cleaners voted

for it and it could continue only so long as they desired it.

We are constrained to hold, therefore, that the Board misinterpreted the law applicable to the facts in this case and that its order dismissing appellee's application to be [fol. 84] certified as the bargaining agent for the employees concerned, was contrary to law.

Full recognition is accorded to the necessarily large discretion vested in the administrative agency in determining the occupational boundaries that comprehend a craft or a class. If, as suggested in the Board's opinion, the employees concerned were, in fact, merely a minority group of an established craft or class that did have a voice in the determination of policy for the entire craft or class, who are seeking without statutory reason to set themselves up as a separate craft or class, the problem presented to us would be easy of solution and we might in good conscience join the Board in its admonition that there be more cooperation between the complaining employees and the members of the intervening Brotherhood;—in other words, that they both "go and sin no more."

As we have pointed out, however, the record raises questions of law and fact that deserve better than cavalier disposition by both the administrative and the courts, and the parties are entitled to have them determined in accordance with the due processes of the law.

The judgment of the District Court is correct and is therefore affirmed.

GRONER, C. J., concurring: As I think the decision here turns upon a single point, wholly unaffected by any of the questions which ordinarily are to be found in controversies over the selection of a bargaining agent for crafts or classes of railway employees, I have thought it desirable to express my views on the subject separately.

The case arises out of a quarrel between two national railway labor unions as to which is entitled under the provisions of the Railway Labor Act to represent, for collective bargaining purposes, a group of forty-five negro employees of St. Paul Union Depot Company, carried on that Company's roster as station porters. After full hearing, the National Mediation Board, whose services had been properly invoked, found in favor of the Brotherhood of Railway & Steamship Clerks, one of the parties to the contest, and held that since the porters were formerly considered by the Depot Com-

pany as part of the craft or class of clerical, office, station and storehouse employees represented by the Brotherhood and not as a separate craft or class which, within the intent of the Act, is capable of speaking for itself or choosing its own representative, the established order of things should be continued.

On petition to review, the District Court reversed the Board and decided the contest in favor of the other party, United Transportation Employees of America (Red-Caps). In reaching this conclusion the Court found as a fact that the majority of the porters' time was served in "red-cap" service; that they were not members of Brotherhood and had not designated it as their bargaining agent; that as a separate craft or class in the circumstances then existing they were entitled to make their own designation and, having unanimously indicated and desired to have United as [fol. 85] their bargaining agent, the Board should certify accordingly.

The essential facts are not in dispute and show that the porters are and have long been regularly employed at the railroad station in St. Paul and their time and pay divided between what is considered red-cap work and custodial work; the former consuming about five hours of their daily time, the latter about three hours, and their wages computed on an hourly basis, some being paid for three hours a day, others for longer, and all receiving the balance of their income from gratuities from passengers using the railroad station.

United is a national union of "Red-Cap" station employees of many American Railway Companies and the forty-five men employed by the Depot Company comprise a local chapter of that union. Individually and as members of that organization they duly requested the Depot Company to enter into a working agreement with United in their behalf, and when this was denied invoked the mediation of the Board. Considered in the light of these facts, the single question, as I view the matter, is whether the porters who at one time were regarded by the Depot Company as custodial employees and for lack of a better classification considered by it as within the ambit of employees represented by the Brotherhood and dealt with accordingly, should now and for all time be compelled against their consent to remain subject to that jurisdiction in their relationships with their

employer. In one of the earlier appeals from the Board,[1] involving a contest between a railway conductors' union and a brakemen's union, in which the the question was whether brakemen (who were also, in the exercise of their seniority, part-time conductors) were entitled to vote in the election of a bargaining representative, we said that the amount of time consumed in the one service as against the other might properly be considered in determining the question, and we indicated that we should be slow to hold that a part-time conductor, whose service time on the railroad is spent fifty per cent as conductor and fifty per cent as brakeman was not entitled to be considered, for bargaining purposes, a conductor. But I think that neither that question nor the question of the precise or exact meaning of the words "craft or class" and of whom they shall be composed, needs to be decided in this case. And this for the reason that here there is admitted to exist a totally different situation from any contemplated by the Act, and which, so far as I know, is unique. And this grows out of the fact, as we have seen, that the Brotherhood, designated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of [fol. 86] work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice

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[1] Brotherhood of Railway Trainmen v. The National Med. Board, 88 F. (2d) 757.

in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity of classification in accordance with established custom, nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their spokesman with the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny in many respects analagous to "taxation without representation." And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws.

[fol. 87] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1943

No. 8374

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS &c., et al., Appellants,

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA &c., et al., Appellees

Appeal from the District Court of the United States for the District of Columbia.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from in this cause be, and the same is hereby, affirmed, with costs.

Dated August 2, 1943.

Per Mr. Chief Justice Eicher of the District Court of the United States for the District of Columbia.

Separate concurring opinion by Groner, C. J.

[fol. 88] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Sept. 11, 1943. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8374

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, et al., Appellants,

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, et al., Appellees

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's Certificate.

Edward C. Kriz, 1416 F St. N. W., Washington, D. C. Frank L. Mulholland, 1041 Nicholas Bldg., Toledo, O. Clarence M. Mulholland, 1041 Nicholas Bldg., Toledo, O. Willard H. McEwen, 1041 Nicholas Bldg., Toledo, O.

Service of a copy of the foregoing and annexed Designa-
[fol. 89] tion of Record is acknowledged this 11th day of September, A. D. 1943.

Cobb, Howard & Hayes, By James A. Cobb,
Attorneys for Appellees.

[fol. 90] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 89, both inclusive, constitute a true copy of the appendix to appellants' brief and the proceedings of the said Court of Appeal as designated by counsel for appellants in the case of:

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EXPRESS AND STATION EMPLOYEES, et al., Appellants,

v.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, et al., Appellees

No. 8374, April Term, 1943, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of September, A. D. 1943.

Joseph W. Stewart, Clerk of the United States Court
of Appeals for the District of Columbia. (Seal.)

IN THE

Supreme Court of the United States

No. .....

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL., *Petitioners,*

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

FRANK L. MULHOLLAND,
1041 Nicholas Bldg.,
Toledo, Ohio,

CLARENCE M. MULHOLLAND,
1041 Nicholas Bldg.,
Toledo, Ohio,

WILLARD H. McEWEN,
1041 Nicholas Bldg.,
Toledo, Ohio,

EDWARD C. KRITZ,
1416 F Street, N. W.,
Washington, D. C.,
Attorneys for Petitioners.

Of Counsel:
MULHOLLAND, ROBIE & McEWEN,
1041 Nicholas Bldg., Toledo, Ohio.

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IN THE

Supreme Court of the United States

No. .....

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL., *Petitioners,*

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Statement of Petition

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, hereby petition this court that a writ of *certiorari* issue to review a certain judgment of the United States Court of Appeals for the District of Columbia entered in this case on August 2, 1943, which said judgment affirmed a judgment of the United States District Court for the District of Columbia entered on July 6, 1942. (R. 78.) The suit in the District Court was captioned: "*United Transport Service Employees of America vs.*

National Mediation Board." No opinion was issued by the District Court. The opinion of the Court of Appeals for the District of Columbia is to be found at page 79 of the record.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended (U. S. C. Title 28, Section 347).

Statutory Provisions Involved

This case involves the interpretation of certain provisions of a statute of the United States known as the Railway Labor Act. In particular it presents a question regarding the nature of the collective bargaining rights of employees which are established under Section 2 Fourth of that Act, and the limitations imposed by the statute upon their exercise. The question of what is a "craft or class of employees" within the meaning of the statute, and, most important, the question of the scope of the discretion which may be exercised by the National Mediation Board under Section 2 Ninth in determining "craft or class" lines, and the extent to which its decisions are subject to being set aside by the courts on review.

The specific statutory provisions involved are as follows:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by

order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission," (Section 1 Fifth, U. S. C. Title 45, Section 151 Fifth.)

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization." (Section 2 Fourth, U. S. C. Title 45, Section 152 Fourth.)

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the

duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragarph." (Section 2 Ninth, U. S. C. Title 45, Section 152 Ninth.)

Statement of the Case

The St. Paul Union Depot Company, as its name implies, operates the union depot property in St. Paul, Minnesota. In connection with this operation, it employs a large number of clerical, office, station and storehouse employees. Of this force a comparatively small group, numbering 45 in all, are classed as "station porters." (R. 16, 35.) The duties of these porters are mixed in character. A portion

of their time is spent in custodial work performed in and about the carrier's station property in St. Paul and a portion is spent in so-called "red cap" work, *i.e.*, carrying hand baggage and generally assisting passengers through the station. The latter phase of their duties is predominant in point of time. (R. 27.) All of these employees are members of the Negro race.

The craft or class of clerical, office, station and storehouse employees of the St. Paul Union Depot Company is represented for the purposes of collective bargaining by the petitioner, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The representative status of the Brotherhood was not determined by an election among the employees but has been recognized since July 1, 1921, long prior to the enactment of the Railway Labor Act, and its authority has never been questioned during this period by the carrier or by the craft or class of employees represented by it. Since the date last mentioned, there has been in existence a collective bargaining contract between this carrier and the Brotherhood, covering the craft or class of clerical, office, station and storehouse employees. (R. 63.) The station porters were understood to be included within the scope of this agreement both by the Brotherhood and by the carrier. (R. 48, 65.) Their grievances were adjusted by Brotherhood officials (R, 55-56), their wages moved upward and downward with those of the other station employees (R. 40), and they were accorded seniority rights in accordance with the terms of the agreement. (R. 45.) Although thus entitled to the benefits of the existing agreement, the station porters were and are not eligible to full membership in the Brotherhood because of their race.

On February 3, 1939, the respondent labor organization, United Transport Service Employees of America, invoked the services of the National Mediation Board under

Section 2 Ninth of the Railway Labor Act for the purpose of securing an investigation of an alleged dispute as to the choice of the station porters in the matter of representatives. The United asserted to the Board that these employees constituted a separate craft or class within the meaning of the statute, and as such were entitled to choose a separate representative for themselves alone. The Brotherhood intervened and contended that the station porters were included within the more comprehensive craft or class of clerical, office, station and storehouse employees, that there was no representation dispute as to this craft or class as a whole, and that the application of the United should accordingly be dismissed.

After a full hearing at which both organizations were represented, the National Mediation Board issued its decision, holding that the station porters were not a craft or class of employees and dismissed the application. A portion of the transcript of the Board's proceedings is to be found at pages 35-74 of the record and its decision at pages 14-27.

Thereafter, United filed suit in the District Court for the District of Columbia asking a mandatory injunction requiring the National Mediation Board to recognize the station porters as constituting a separate craft or class of employees and to make an investigation of their choice of representatives. The National Mediation Board answered and the petitioner here intervened as a party defendant in the District Court. No additional evidence was taken by the court, the case being heard on the record made before the National Mediation Board. After hearing, the District Court entered judgment in favor of the plaintiff United Transport Service Employees. The findings and order of the District Court are set forth in the record on pages 75-78.

After the District Court had announced its decision, but before any formal order had been prepared, the court requested counsel to submit proposed findings of fact and conclusions of law. Such a submission was made by the plaintiff's attorneys, and the Department of Justice, acting as representative of the National Mediation Board, presented objections. These objections were delivered to the Judge and not filed with the Clerk of the court, and hence do not form a part of the record in this case. We consider them significant here because they constitute the only official statement of the position of the Department of Justice with regard to the propriety of the judgment below, a matter in which this court will doubtless be interested because of the Department's failure to participate in the subsequent proceedings. The following is quoted from the objections in question:

> "Plaintiffs propose a finding of fact (No. 1) that the employees involved in the dispute under consideration constitute a separate craft or class for bargaining purposes; a finding of fact (No. 2) that the employees have not designated the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their bargaining agent, and that the said Brotherhood is not as a matter of fact their bargaining agent; and a finding of fact (No. 3) that the preponderance of service rendered by the employees was as 'red caps' and that this fact entitles such employees to be so designated. Whether in a given case certain employees are members of one craft or another, whether they have been represented by a particular union, and whether the craft lines are to be determined by the proportion of time spent in a given service or by other varying factors, are all questions of fact and administrative judgment. On the evidence before it the Board has resolved each of these questions. If its judgment is arbitrary and capricious because not supported by substantial evidence, this court has the power so to find and to set the Board's order aside.

It is not the court's province, however, to weigh the evidence and make independently the administrative decision which, in its judgment, the Board should have reached.

"2. Plaintiffs propose a finding that the employees involved in this case did not and could not belong to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Finding No. 2). The proposed conclusions of law do not state that this fact affects or controls the decision, but such is the implication. We submit that if any finding is made on this subject the court should indicate in what manner the finding is relevant to the decision. The United States Court of Appeals for the District of Columbia has specifically repudiated the proposition upon which the proposed finding is apparently based. *National Federation of Railway Workers vs. National Mediation Board,* 110 F. (2d) 529, 537-538, certiorari denied 310 U. S. 628. In that case the plaintiff Federation made the same contention as is presented here, and although the Government in its argument, and this court in its opinion both took the position that the race question was not an essential factor, the Court of Appeals passed upon it in general terms which would seem to be applicable here, and the Supreme Court denied certiorari. The Court of Appeals said (p. 538):

'In the last analysis, the Federation's contention reduces itself to the proposition that the members of every race in a craft of workmen have a constitutional right to representation by one of their own race, which neither the majority of the craft nor their own race may take from them. Acceptance of such a principle would certainly destroy the bargaining advantage of the united front secured to employees by the provision of the Act that a majority of any craft shall select the representative for the craft. The Federation really objects to the principle of majority rule as applied to the selection of the bargaining agency or representative. It is clear beyond doubt that constitutional objection to majority rule in the selection of an employee bargaining agency cannot prevail. *Virginian Ry. Co. vs. Sys-*

tem Federation, 300 U. S. 515, 516, 548, 57 S. Ct. 592, 81 L. Ed. 789; *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. *Cf. Grovey vs. Townsend, supra.*' "

The plaintiff's suggested findings and conclusions were accepted in spite of the Government's objections, and judgment was entered in the District Court in favor of the plaintiff. Although the Department of Justice, in the document above quoted, expressed itself as considering the judgment erroneous, it declined to join in an appeal, has not participated further in the case, and has made no additional statement as to its position on the law. This fact is the more remarkable because, in another case now pending before this court, we are advised that the Government has taken the position that the National Mediation Board is not subject to suit without governmental consent, and that in the absence of such consent, the courts are without jurisdiction to entertain a suit against it. See the Government's brief in the case of *Switchmen's Union of North America vs. National Mediation Board*, Case No. 48 in the Supreme Court of the United States. It should be borne in mind that the present action originally named the National Mediation Board as sole party defendant, and that the petitioners herein entered the suit by intervention. Nevertheless, the issue of the liability of the Mediation Board to suit was not raised by the Government.

After the entrance of judgment by the District Court for the District of Columbia, an appeal was taken by the present petitioners to the Court of Appeals for the District of Columbia, which court, however, affirmed the judgment of the District Court. This petition for a writ of *certiorari* is filed for the purpose of securing a review of that decision.

Issues Presented and Position of Petitioners

As we understand the opinion of the Court of Appeals for the District of Columbia, it is based primarily on an asserted principle of law that ineligibility to membership in a labor organization fixes the limits of a craft or class of employees within the meaning of the Railway Labor Act. Under this decision, the National Mediation Board appears to be barred from exercising any discretion in such cases, and is required as a matter of law to recognize ineligible employees as constituting a separate craft or class because of their ineligibility. In addition to the general principle above stated, the Court of Appeals in its opinion calls attention to certain specific facts in the case at bar, which, it asserts, lends peculiar support to its position, but which are in fact wholly irrelevant as will be noted below.

The petitioners contend that the decision of the Court of Appeals is erroneous and should be reviewed and reversed by this Court, because

I. The interpretation given to the Railway Labor Act as requiring that employees ineligible to membership in a labor organization cannot be included in a "craft or class of employees" represented by that organization, is erroneous, as shown by:

A. The language of the statute and the course of its historical development.

B. Administrative interpretations of similar statutes.

II. The decision of the Court of Appeals is based in part on special features of this case which are, in fact, neither determinative nor relevant.

III. The effect of the decision of the Court of Appeals is to deprive the National Mediation Board of essential authority to decide issues which are primarily administrative in character.

Argument

I. INTERPRETATION GIVEN TO THE RAILWAY LABOR ACT AS REQUIRING THAT EMPLOYEES INELIGIBLE TO MEMBERSHIP IN A LABOR ORGANIZATION CANNOT BE INCLUDED IN A "CRAFT OR CLASS OF EMPLOYEES" REPRESENTED BY THAT ORGANIZATION IS ERRONEOUS.

A. The Language of the Statute and the Course of its Historical Development.

The Court of Appeals predicates its decision primarily upon the provision of Section 2 Fourth of the Railway Labor Act, which is to the effect that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." The court fails, however, to give consideration to the fact that the right so granted is limited as to the mode of its exercise. While every individual employee has the right to participate in collective bargaining, it is obvious that if he wishes to enjoy that right, he must do so in cooperation with others. Collective bargaining is necessarily a group enterprise. The Railway Labor Act does not confer the right to bargain collectively on every group which desires to do so. The nature of those groups who are permitted to enjoy this right is particularly expressed in the statutory provision that "the majority of any *craft or class of employees* shall have the right to determine who shall be the representative of the *craft or class* for the purposes of this Act."

To say, as the lower court says, that a group of employees must be considered as a craft or class in order to guarantee it the right of collective bargaining conferred by the statute, is therefore a question-begging approach to the case. Such a group must first establish that it is in

fact a craft or class before it is shown to be entitled to participate in collective bargaining. It is the position of petitioners that the status of any group of employees as a craft or class is not to be determined by the fact that a failure to so classify it will deny it the right to bargain collectively as a group. Many types of employee groups are denied that right by the statute. The question of "craft or class" status must rather be determined objectively and the answer will depend upon the innate characteristics of the group in question. This contention is sustained by the language of the Railway Labor Act and its historical background.

The Statutory Language. The statute itself contains no definition of the words "craft or class." The phrase carries with it, however, the connotation of a group of employees performing generally similar services and having common interests in their employment. It is a phrase of restricted meaning. This fact can best be shown by contrast.

The counterpart of the Railway Labor Act is the National Labor Relations Act, which operates in the industrial field. The latter statute provides for collective bargaining units of employees but in very different language from that used in the Railway Labor Act. Section 9(b) of this statute reads as follows:

> "The (National Labor Relations) Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (U. S. C. Title 29, Section 159(b).) (Portion in parentheses not a part of quotation.)

Three facts are apparent from this language. In the first place, a wide variety of collective bargaining units is contemplated. Plant units and employer units, as well as the more restricted craft units, and subdivisions of each of these, are recognized. Secondly, the National Labor Relations Board is given the authority to fix upon the type of unit to be used. Thirdly, the discretion of that Board is to be governed exclusively by the prospective consideration of how well various units may be expected to operate in the practical functioning of collective bargaining.

The Railway Labor Act is predicated upon a very different theory. No variety of units is contemplated. The "craft or class"* is the only one recognized. The National Mediation Board has no power to fix the type of unit to be used, in any given case. It may merely determine (under Section 2 Ninth) whether an asserted craft or class is such in fact, and what employees are members of it, entitled to participate in a representation election. Thus, the National Mediation Board cannot recognize an employer unit or plant unit of employees or a subdivision of a craft or class unit, however successful it may consider that such a unit would be in collective bargaining. On the other hand, it may not refuse to recognize any craft or class unit, however much it may feel that there exist within it elements of dissension which will render collective bargaining difficult or even impossible.

From the language of the Railway Labor Act, there-

*No particular significance is to be attached to the fact that the statute uses the alternative expression of craft *or* class. Certain groups of railroad employees have been for many years considered as crafts in the strict sense of the word. Craftsmen are skilled mechanics and any individual desiring to attain the status of craftsman must pass through a rigid apprenticeship. Shop employees of the railroads are habitually referred to as the "shop crafts." Other groups of railroad employees do not maintain this craft system, and are accordingly referred to as classes. The phrase "craft or class" therefore does not refer to two types of employee groups, but merely to the two names by which those groups are commonly known in the industry. We know of no decision, administrative or judicial, which seeks to make any real distinction between them.

fore it appears that the phrase "craft or class" is one of definitely restricted significance. A specific type of collective bargaining unit is meant. This fact becomes more apparent as well as more significant, when we consider the historical background of the statutory phrase. Such a study will reveal the nature of the unit to which Congress referred.

Historical Development of the "Craft or Class" Concept in Railroad Labor Legislation.

The language of Section 2 Fourth of the Railway Labor Act, relating to crafts or classes of employees was drawn from one of a group of principles laid down by the United States Railroad Labor Board in Appendix B of its Decision No. 119, *International Association of Machinists, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 2 U. S. R. L. B. 87. The principle, as stated by the Board, reads as follows:

> "The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."* (page 96.)

Decision No. 119 of the Railroad Labor Board was issued under the following circumstances. During the period of Federal control of railroads, the United States Director General executed a series of so-called "National Agreements" with the standard labor organizations of rail-

*This Court recognized the above quoted provision as the source of the language of Section 2 Fourth in the course of its opinion in the case of *Virginian Railway Company vs. System Federation No. 40*, 300 U. S. 515, at page 561.

road employees, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees among others. With the termination of Federal control, these agreements were kept in effect temporarily by order of the Railroad Labor Board. The organizations proposed that they be retained in effect permanently. This the carriers declined to do. The dispute growing out of this request and refusal was referred to the Board and resulted in the issuance of Decision No. 119. This decision continued the rules of the National Agreements in effect until July 1, 1921, when they were to be abrogated and presumably replaced by individual agreements executed on the properties of the various carriers. Exhibit B constituted a statement of principles which the Board considered should control negotiations between the parties.

In dealing with railroad labor problems, the U. S. Railroad Labor Board was confronted with the fact that employees were already divided into recognized classes for the purpose of collective bargaining. As the Board stated in the course of its opinion in the above cited case:

> "During Federal control the Director General of Railroads entered into contracts with *organizations of employees of these carriers.* These contracts, called national agreements, set out *the classes of employees affected,* define with particularity the grades *in each class,* specify work to be done by each grade, hours of service, when payments shall be made, how forces shall be reduced, seniority determined, work assigned, grievances adjusted, apprentices trained, and otherwise fix the rights and obligations of the parties as to working conditions." (Emphasis supplied) (pp. 87-88.)

Thus, when the Board held that the majority of each craft or class of employees was entitled to select its own collective bargaining representative, it was not attempting to establish a new system or new collective bargaining

units. It merely recognized units which were already established and functioning.

Naturally enough, controversies arose after the issuance of Decision No. 119, as to what constituted a craft or class of employees. In the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees vs. Pennsylvania System*, 2 U. S. R. L. B. 216, the Board was called upon to consider this question, and said:

> "The Labor Board has heretofore held that employees performing work similar in its general characteristics and in the conditions surrounding it belong to the same class, within the meaning of the statute. It now holds the converse of this proposition—namely, that employees performing work dissimilar in its general characteristics and in the conditions surrounding it must be assigned to different classes, within the meaning of the statute." (p. 221.)

In still other cases, questions arose as to the connection between union membership and membership in a craft or class. In the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees vs. Maine Central Railroad Company*, 4 U. S. R. L. B. 700, the Board held that:

> "* * * employees of a class or craft come under the provisions of the agreements negotiated by the organization representing a majority of such class or craft, irrespective of membership or nonmembership in the organization holding the agreement for the particular class or craft." (p. 702.)

To the same effect, see *Brotherhood of Railroad Station Employees vs. Portland Terminal Company*, 5 U. S. R. L. B. 381.

Summarizing these decisions of the Railroad Labor Board, three facts are apparent. In the first place, the Board's selection of the craft or class of employees as the

bargaining unit was made on the basis of retrospective considerations. Such units already existed. The Board did not create them. It merely sanctioned their continuance. Secondly, the Board conceived of the craft or class of employees as a group having common characteristics as to the nature of their employment, a purely objective factor. Finally, the Board considered the craft or class as something totally distinct from the labor organization which might be chosen to act as its representative. All members of the craft or class might vote for a representative, irrespective of union membership and the chosen representative was obligated to represent members and non-members alike.

When Congress adopted the Board's phraseology and enacted it into statutory law, it must be presumed to have adopted as well the meaning which the Board attached to it. In fact, when Mr. Joseph B. Eastman* appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives to sponsor the Act, he was asked as to the meaning to be attached to the phrase "craft or class of employees." His answer was as follows:

> "We thought of that, as to whether or not it was necessary to define craft or class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees." ("Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d Session, H. R. 7650," page 45.)

To summarize this whole phase of the discussion based on the language and history of the statute, it appears that by the designation of the craft or class as the collective

*Mr. Eastman was then Federal Coordinator of Transportation. He and his staff had given considerable study to the railroad labor situation and had participated in the drafting of the bill which later became the Railway Labor Act.

bargaining unit for railroad employees, Congress intended:

(1) To restrict the type of collective bargaining units into which these employees might be subdivided;

(2) To provide for so-called "horizontal" units distinguished from one another by objective factors such as the characteristics of the work performed;

(3) To recognize units already established and existing throughout the industry for many years;

(4) To provide that membership or non-membership in a labor organization should not govern either in regard to the right of employees to express their choice of a representative or in regard to the representative's right or duty to speak for all employees after it had been properly selected;

(5) To restrict the power of the National Mediation Board to that of determining lines of demarcation between crafts or classes rather than to permit it to establish collective bargaining units which would, in its judgment, be most successful for that purpose.

The significance of these conclusions in relation to the issues of the present case lies in the fact that the limits of crafts or classes of employees depend largely on retrospective and objective considerations drawn from collective bargaining history in the industry rather than upon prospective considerations involving the probability of satisfactory collective bargaining in the future. We believe that a technically sound argument could be made to the effect that the National Mediation Board is entirely limited to these retrospective and objective factors when called upon to differentiate between crafts or classes of employees. We doubt, however, whether such an extreme position could be or need be maintained. Certainly it would not accord with the practice of the Board, which has from time to time given consideration in representation cases to the probable effects of its decisions as measured in terms of the suc-

cessful functioning of the Railway Labor Act for the purposes intended.* It cannot be denied, however, that the Board's consideration of such factors is definitely circumscribed by the language of the statute. We repeat that the Board has no power to recognize any collective bargaining unit, however much it may appear to offer in the way of successful collective bargaining, unless that unit can bring itself within the historical definition of the craft or class of employees. For the most part, this definition depends upon retrospective and occupational factors. The field left for a play of administrative discretion in the matter of prospective factors is therefore strictly limited.

The question of eligibility or ineligibility to membership in a labor organization is a purely prospective element which relates to collective bargaining within the craft or class. While we believe that the National Mediation Board may give such an element consideration, it may not do so to the exclusion of the historical factors which lie at the very source of the craft or class concept. *Yet this is exactly what the Court of Appeals has ordered the Board to do in this case.* This, we submit, is erroneous. Ineligibility to membership in a labor organization should be considered at most as being but one factor among many which may determine craft or class lines. It should be weighed in connection with other factors of employment characteristics and collective bargaining practice on the property, and the Board should be permitted to reach a decision in light of all of the elements of the problem and the facts of the specific case.

The Court of Appeals, however, would elevate the ineligibility factor to a position of supreme importance. It would be established as a rule of law that, wherever in-

*See "The Railway Labor Act and the National Mediation Board," a pamphlet published by the National Mediation Board in August, 1940, pages 15-17, inc.

eligibility is found to exist, the Board must recognize a new craft or class of employees made up of the ineligible workers. Such a holding runs directly counter to the language of the Railway Labor Act and its historical background.

B. Administrative Interpretations of Similar Statutes.

Insofar as we are aware, the only tribunal, administrative or judicial, (other than the National Mediation Board and the lower courts which passed upon this case), which has had occasion to pass on the question of ineligibility in relation to collective bargaining units of employees, is the National Labor Relations Board. Its decisions on this point are therefore significant.

As noted above, the National Labor Relations Act provides that "the board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-division thereof." (U. S. C. Title 29, Section 159 (b).)

With all of its broad powers to mold bargaining units according to the needs of individual situations, it has always considered the item of eligibility or ineligibility to membership in a labor organization as only *one factor among many* in determining collective bargaining units, and their scope. In its Second Annual Report, page 129, the Board stated:

> "The rules of eligibility to membership in the unions which the employees form or join constitute one of the clearest manifestations of the manner in which they desire collective bargaining to take place. If such organizations are formed of the employees'

free will, the qualifications for membership therein reflect the judgment of the employees as to the proper unit for collective bargaining."

* * * * *

"However, it is clear that the Board cannot be bound in determining the appropriate unit by the rules established by the labor organizations in the field. Those rules constitute only one of the factors which the Board considers in making its decision. Not even the fact that some of the employees involved are ineligible to membership in one or more of the competing unions is necessarily a bar to their inclusion in the unit found appropriate by the Board."

To the same effect, see the statements made by the Board in its Third Annual Report, pages 166-167.

In a number of cases, the Board has applied this principle by establishing collective bargaining units whose limits are in accord with the eligibility provisions of organization constitutions. In other cases, however, it has considered the factor but has also considered that other factors outweighed it in importance. Thus, in the case of *In the Matter of Sloss Sheffield Steel and Iron Company*, 14 N. L. R. B. 186, 192, the Board held that an appropriate unit could include Negro employees ineligible to membership in the organization where the organization agreed to bargain for such employees if selected as the representative. This same proposition appears to be supported by the case of *In the Matter of Floyd A. Fridell*, 11 N. L. R. B. 249, which is cited by the Board in support of its decision in the *Sloss Sheffield* case.

The principle established by the *Sloss Sheffield* case was reiterated by the Board in its opinion in the case of *In the Matter of American Granite Finishing Company*, 27 N. L. R. B. 1016.

The case of *In the Matter of California Walnut Growers Association*, 18 N. L. R. B. 493, involved the situ-

ation of 65 male employees who were ineligible to membership in an organization known as the Walnut Workers' Union. These employees were included in the collective bargaining unit which the union would presumably represent, against the protest of the union itself.

To our knowledge, none of these decisions has ever been challenged in court, nor has it ever been asserted from any authoritative source that the National Labor Relations Board could not as a matter of law include within a proposed collective bargaining unit employees who are ineligible to membership in a labor organization which will presumably act as their collective bargaining representative. Surely if such an alleged principle of law has any place anywhere in the field of labor relations, it should be applicable to the National Labor Relations Board, whose choice of collective bargaining units is virtually unlimited and which is specifically directed to choose the one most conducive to full employee representation. Yet the National Labor Relations Board has not recognized the existence of such a rule, but has reserved to itself the discretionary power to weigh ineligibility in connection with other elements and to deside its cases accordingly. This is the same discretion whose existence we assert with reference to the National Mediation Board, but which is denied by the opinion of the Court of Appeals.

II. THE DECISION OF THE COURT OF APPEALS IS BASED IN PART ON SPECIAL FEATURES OF THIS CASE WHICH ARE, IN FACT, NEITHER DETERMINATIVE NOR RELEVANT

In its opinion, the Court of Appeals refers to certain facts of the present case as affording a peculiar justification for the decision reached. It is stated at several points

that the *employer* had designated the Brotherhood as the representative of the employees in question and that they themselves had never had the opportunity to participate in a representation election. As typical, we quote the following from the opinion of the court:

> "But the employees in the case at bar have had their representative designated for them by their employer without even the opportunity to exercise the right of being in the minority or to fail to vote if they should so choose."

This statement, while not wholly incorrect, is one of those half-truths which so easily lead to misunderstandings. In this case, it seriously misled the Court of Appeals. The facts in this connection are as follows: In 1921, after the termination of federal control of the railroads, and shortly after Decision No. 119 of the U. S. Railroad Labor Board was issued, the St. Paul Union Depot Company recognized the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the craft or class of clerical, office, station and storehouse employees on its property, and executed an agreement with it covering the wages, hours and working conditions of such employees. (R. 62-63.) There was nothing illegal or reprehensible in this procedure. At that time, when disputes existed as to the choice of representatives by a craft or class of employees, the U. S. Railroad Labor Board could and did conduct representation elections and order the carrier to recognize the successful contestant. Orders of the Board, however, were not enforceable by legal process, and the effective status of the selected representative depended ultimately on the recognition of it by the carrier. In the present case, the carrier extended that recognition to the Brotherhood voluntarily without an election, in the apparent belief that it represented a majority choice. There is no record of any pro-

test by any party nor of any petition for an election among the craft or class of clerical, office, station and storehouse employees, so that the carrier's decision appears to have been fully justified.

This condition has continued unchanged to the present day, although the contract itself has been modified in some particulars. There has been full opportunity for a challenge of the Brotherhood's status as the representative of the clerical, office, station and storehouse employees from 1920 to 1926 (by an election conducted by the U. S. Railroad Labor Board) and from 1934 to the present time (by an election conducted by the National Mediation Board under Section 2 Ninth of the Railway Labor Act). There has been no such challenge. Accordingly, the statement of the Court of Appeals to the effect that the Brotherhood was "designated" by the St. Paul Union Depot Company as the representative of employees is incorrect. The craft or class of clerical, office, station and storehouse employees designated their own representative. The company merely recognized the will of the majority, and the correctness of its decision is shown by over 20 years of uniformly harmonious relations. Surely no carrier is obligated by the Railway Labor Act or any other statute to question the status of any asserted representative when there is no dispute as to its authority.

The court states further that the station porters have never had the opportunity to participate in a representation election. This statement is correct. No members of the station forces of this company have had such an opportunity. There has never been a representation election in which any of them could participate. There has never been a representation dispute necessitating the holding of an election. The Court of Appeals, however, relies heavily on the absence of any election in support of its decision. It recites this fact as distinguishing the present case from its

own decision in the case of *National Federation of Railway Workers vs. National Mediation Board*, 71 App. D. C. 256, 110 F. 2d 529, where the court upheld a certification of the National Mediation Board designating as the representative of a craft or class of employees an organization which did not admit certain members of the craft or class as members of the organization. We fail utterly to see any logical foundation for such a distinction. The basic substantive provision of the Railway Labor Act is that contained in Section 2 Fourth to the effect that a majority of a craft or class shall have the right to select a representative to act for the craft or class. Section 2 Ninth of the statute, in providing for a representation election, merely implements the provision in Section 2 Fourth, and provides the means whereby the will of the majority may be ascertained in case of a dispute. There is, therefore, no particular virtue in a representation election such as to affect the substantive rights of individuals. The decision of the Court of Appeals on this point, if reduced to its ultimate principles, means that the existence of a representation dispute and the holding of a representation election may operate to include within a craft or class certain employees who would not be included in the absence of a dispute and election. This is a wholly untenable position. It ignores the fact that the craft or class is a stable unit whose limits are determinable by objective standards, standards which are as applicable and as fully operative in cases where no representation dispute exists as they are in cases where there is such a dispute.

All in all, it appears to us that the decision of the Court of Appeals was based on an assumption of the very point at issue in the case. It assumed that the station porters constitute a separate craft or class. Having made this assumption, it was not difficult to reach the conclusion that they had been deprived of their right to select a sep-

arate representative, and to bargain collectively as a group. On this assumption, too, the act of the carrier in refusing to recognize the United as the representative of the station porters became wrongful. Having recited these alleged wrongs, the court then decided that in order to eliminate them, it was necessary to order the National Mediation Board to recognize the station porters as a separate craft or class. The court failed to realize that the wrongs which it recited are wrongs only if the station porters do in fact constitute a craft or class of employees. The court gave little or no consideration to the historical objective facts upon which a determination of craft or class lines must be based.

Hence, it appears that the special facts which the Court of Appeals emphasized in its opinion are not significant in relation to the real issue in the case. The court, by stressing these points, begged the question which was before it and reached an erroneous decision.

III. THE EFFECT OF THE DECISION OF THE COURT OF APPEALS IS TO DEPRIVE THE NATIONAL MEDIATION BOARD OF ESSENTIAL AUTHORITY TO DECIDE ISSUES WHICH ARE PRIMARILY ADMINISTRATIVE IN CHARACTER

The National Mediation Board was established in 1934. It is the oldest of all federal agencies operating in the field of labor relations. Its career has been notably lacking in those bitter controversies over procedure, personnel and principles of decision which have characterized the history of many contemporaneous agencies. While its primary function is mediatory, it has, as we have seen, a positive jurisdiction under Section 2 Ninth of the Railway Labor Act to *decide* certain controverted issues arising out of representation disputes. This jurisdiction it has exercised for

over nine years. During the first eight of those years, it considered 903 representation controversies, and its decisions were received with a minimum of protest and litigation.*

During the period of the operation of the Railway Labor Act and of the Board, its principal administrative agency, strikes and labor disturbances of serious proportions have been practically unknown in the railroad industry.** The record of the Board compels the conclusion that it has shown itself to be a truly expert tribunal. It has been able to attune its operations to the needs of employers and employees in the railroad industry.

The present case was handled by the Board in accordance with its usual procedure and methods. A full hearing was had and a record was taken. Thereafter the Board issued a lengthy and comprehensive opinion wherein it analyzed the contentions of the parties and announced its conclusion. (R. 14-27.) In this opinion, it stated the problem before it thus:

> "In questions of craft or class determination the Board gives consideration to many factors, most important of which are the intent and purpose of the Railway Labor Act in the matter of labor representation and the maintenance of sound labor relations on the railroads. Each individual case, of course, requires consideration of many facts peculiar to the particular situation, but, in addition, there are general factors to be considered. These include the composition and relative permanency of the employee groupings along craft or class lines for representa-

*For a general discussion of the functions and procedure of the Board in representation cases, see "Administrative Procedure in Government Agencies, Monograph of Attorney General's Committee on Administrative Procedure," Part 4, page 22. For a discussion of the relatively small number of instances in which Board decisions have been challenged in court, see "The Railway Labor Act and the National Mediation Board," page 37. For the number of representation controversies handled, see the "Eighth Annual Report of the National Mediation Board," page 22.

**"The Railway Labor Act and the National Mediation Board," page 28; "Seventh Annual Report of the National Mediation Board," page 9; "Eighth Annual Report of the National Mediation Board," page 8.

tion purposes not only on the particular carrier but on the railroads generally. The extent and effectiveness of past collective bargaining arrangements on the part of the employees regarding seniority, promotion and demotion are other factors which must be considered, as are the duties and responsibilities of the employees and the nature of their work. Previous decisions of the Board which bear upon the issues involved in a particular controversy are also taken into account. All of these factors have received the consideration of the Board in coming to a conclusion respecting the issues involved in this case." (R. 22-23.)

Without attempting to discuss all phases of its opinion at length, it will be sufficient to note that the Board found that "for many years the employees here concerned have been part of the craft or class of clerical, office, station and storehouse employees in the service of the company." (R. 23.)

It held that the fact that "station porters are carried on seniority rosters, that their positions are bulletined and assigned to the applicant with the greatest seniority, that they have 'bumping' rights—all of these circumstances demonstrate that station porters have acquired benefits in the form of seniority rights as members of the craft or class of clerical, office, station and storehouse employees through representation on the property by the Brotherhood." (R. 25.)

It called attention to the fact that in numerous prior cases, it had been called upon to fix a line of demarcation between the craft or class of clerical, office, station and storehouse employees on the one hand, and the craft or class of red caps on the other, and that in such cases, it had determined that the line should be drawn so as to include in the former group all those who devoted all or a portion of their time to custodial duties and in the latter group, those employees who performed no custodial work. These

decisions were entered without any serious disagreement on the part of either of the two organizations now before this court. The Board summarized its past findings in this regard in the following language:

> "Furthermore, irrespective of what organization has been designated as representing so-called 'redcaps'—employees performing only personal service for passengers—such organizations and the carriers concerned have invariably negotiated separate agreements establishing the labor standards of their employees. On the other hand, where employees who, incident to their personal service for passengers, also perform custodial duties for carriers, are covered by agreements, such agreements cover the entire craft or class of clerical, office, station and storehouse employees." (R. 22.)

Finally, considering the specific feature of ineligibility, the Board said:

> "The employees here involved are colored and because of this they are not eligible for membership in the Brotherhood. It has been implied that by this fact it is recognized that these employees are a separate craft or class. With this position the Board cannot agree because there is no relationship in the Railway Labor Act between representation and membership or non-membership in a labor organization. Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the representatives' organization as well as those who are members." (R. 26-27.)

It is submitted that the opinion of the National Mediation Board reveals a clear appreciation of the problem before it and a thoughtful effort to solve that problem through a consideration of all relevant factors. The opinion bears throughout the hallmark of careful administrative judgment, informed and expert in the field wherein it operates.

We are now faced with a judicial decision setting aside the conclusion of the Board on the ground that the factor of ineligibility does not present a question of fact but a question of law, and holding that where ineligibility is found to exist a separate craft or class must be created to embrace the ineligible employees. This decision is rendered by a tribunal which, while according it due respect, cannot claim to be peculiarly expert in the field of railroad labor relations. It purports to exclude the National Mediation Board, a specialized and expert tribunal, from the exercise of discretion which is essential to the fulfillment of its statutory purpose.

Let us consider this question of ineligibility to membership in labor organizations in its various ramifications. Ineligibility may be due to race, or sex, or age. Some labor organizations exclude the adherents of various political groups whose beliefs are considered to be opposed to the American form of government. Some require a salute to the American flag, which the adherents of certain religious cults are unwilling to give. Some will not admit to membership any workers who have been employed as strike-breakers. Some refuse to re-admit those who have been members but who have been expelled for cause. There are dozens of different sorts of membership requirements, each one of which may result in the exclusion of groups of employees. Is each of these groups to be considered as a separate craft or class entitled to select representatives under the Railway Labor Act? Are we to have, perhaps, a situation where two employees working side by side and performing the same work are nevertheless members of different crafts or classes merely because one is eligible to membership in a certain labor organization and the other is not? Will a change in the eligibility rules of a labor organization which is acting as a collective bargaining representative have the effect of changing the limits of the

craft or class which it represents? If that labor organization loses the support of a majority and is supplanted by another having different eligibility rules, will craft or class lines be altered thereby?

We ask these questions not because we believe that their answer is to be found in the decision of the Court of Appeals and not because we expect them to be answered by this court. We present them merely to show the complicated nature of the problem, its close relationship to the process of collective bargaining, and its connection with the functioning of the Railway Labor Act. The problem in essence is not a judicial problem but an administrative one. It is obvious that this whole question of eligibility to membership in labor organizations is a delicate question which calls for the utmost of expert knowledge and sound discretion. No single inflexible answer will serve for all cases and all situations. As we understand the decision of the Court of Appeals, it attempts to state such an inflexible answer in the form of a positive rule of law. This is an improper approach which will exclude the discretionary power of the National Mediation Board at the very point and with regard to the very question where the exercise of that power is most needed. We cannot but believe that such a course will seriously impair the effectiveness of the Board and of the Act which it is required to administer.

Conclusion

In the above discussion, we have pointed out that the decision of the Court of Appeals for the District of Columbia should be reviewed and reversed by this court, because,

First, it erroneously holds that employees who are ineligible to membership in a labor organization cannot as a matter of law be included in the craft or class of employees

which is represented by that organization. This conclusion runs counter to the language of the Railway Labor Act and to the historical background of the phrase "craft or class of employees." The crafts and classes of railroad workers are collective bargaining units whose existence antedates that of the statute itself. To a considerable extent their limits are inflexible and must be determined on an objective and retrospective basis. Eligibility to membership is a prospective factor. At most, it can be but one element in any dispute regarding the limitations of a craft or class. It is not controlling, but must be weighed by the National Mediation Board in relation to other elements, all in the exercise of the Board's sound discretion. This is the conclusion reached by the National Labor Relations Board whose authority in relation to collective bargaining units is broader and is directed more to prospective considerations of future collective bargaining than is that of the National Mediation Board.

Second, the decision of the Court of Appeals is based in part on certain factors peculiar to this case whose significance was wholly misconstrued by the court. Recognition of a union by an employer when the desire of a majority of employees is unquestioned, does not constitute a "designation" of a collective bargaining representative by the employer. The fact that a representation election has not been held, does not operate to change the limits of a craft or class of employees. The decision below rests in part on the converse of these two propositions, and is therefore erroneous.

Third, if allowed to stand, the decision of the Court of Appeals will seriously impair the effectiveness of the Board and of the Railway Labor Act. We have pointed out in this connection the enviable record of this Board generally, and the carefully reasoned and judicious nature of its findings and conclusion in this case. We have further

called attention to the whole problem of ineligibility and have pointed out that because of its inherent complications, it is one which falls peculiarly within the ambit of administrative discretion.

We submit, therefore, that the decision of the Court of Appeals is erroneous as a matter of law, and that it constitutes a serious threat to the administrative efficiency of the National Mediation Board, and to the orderly development of the principles of administrative law generally. For these reasons, we ask this court to issue a writ of *certiorari* for its review.

Respectfully submitted,

FRANK L. MULHOLLAND,
1041 Nicholas Bldg.,
Toledo, Ohio,

CLARENCE M. MULHOLLAND,
1041 Nicholas Bldg.,
Toledo, Ohio,

WILLARD H. MCEWEN,
1041 Nicholas Bldg.,
Toledo, Ohio,

EDWARD C. KRITZ,
1416 F Street, N. W.,
Washington, D. C.,
Attorneys for Petitioners.

Of Counsel:
MULHOLLAND, ROBIE & MCEWEN,
1041 Nicholas Bldg., Toledo, Ohio.

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 435.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ET AL.,
Petitioners, and Appellants Below,

v.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL.,
Respondents, and Appellees Below.

PETITION FOR A RECONSIDERATION OR REHEARING.

JAMES A. COBB,
GEORGE E. C. HAYES,
CHARLES H. HOUSTON.

COBB, HOWARD & HAYES,
Attorneys at Law,
613 - F - Street, N. W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A RECONSIDERATION OR REHEARING.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners herein, respondents and appellees below, and present this petition for a reconsideration or rehearing, and for the vacating of a judgment reversing in a per curiam decision the judgment of the lower court.

JURISDICTION.

On the 6th day of December, 1943, the Court entered the following order in the case of *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America, et al.*, No. 435, October Term, 1943:

> "*Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.; General Committee of Adjustment v. Southern Pacific Company; General Grievance Committee v. General Committee of Adjustment; and Switchmen's Union of North America v. National Mediation Board, Nos. 23, 27, 41 and 48, respectively, decided November 22, 1943."

This petition for a reconsideration or rehearing is filed within twenty-five days from December 6, 1943, in accordance with Rule 33 of this Court.

REASONS FOR PETITION FOR RECONSIDERATION OR REHEARING.

The original cause of action in the District Court of the United States for the District of Columbia was brought by the United Transport Service Employees of America, an unincorporated labor organization, and a number of individual employees of the Saint Paul Union Depot Company against the National Mediation Board in which cause the Brotherhood of Railway and Steamship Clerks, Freight-handlers, Express and Station Employees, et al., were allowed to intervene. The pleadings revealed that about forty-five station porters (redcaps) in the employ of the Saint Paul Union Depot Company, Saint Paul, Minnesota, after organizing as a local chapter of the respondent appellee, the United Transport Service Employees of America, (hereinafter called the "United") applied to their employer for the execution of a working and wage agreement and joined with the "United" in requesting recognition of

the "United" as their bargaining agent. The intervenors, the Brotherhood of Railway and Steamship Clerks (hereinafter called the "Brotherhood") took the position that the redcaps were covered by a working agreement between the employer and the Brotherhood, entered into in 1921.

The Mediation Board's services were invoked to investigate this dispute over the representation. The Board dismissed the application on the ground that station porters "are part of the craft or class of clerks, office, station and storehouse employees and not a separate craft or class for the purposes of the Railway Labor Act and that 'no dispute over representation has been found by the Board to exist among the craft or class of * * * (such employees in the services of the company).' "

Certain conceded facts are important as a background to this petition. The working agreement entered into in 1921 between the Saint Paul Depot Company and employees represented by the Brotherhood (1) did not list station porters or "redcaps"; (2) the Saint Paul redcaps at no time designated the Brotherhood as their bargaining agent but in fact unanimously so designated the United; (3) the Mediation Board has recognized the United as a craft or class organization, acting for redcaps either by actual certification to or through knowledge of executed agreements with upwards of twenty-one railroads and station companies; (4) the Saint Paul redcaps are all colored and because of this are not eligible for membership in the Brotherhood.

In spite of the foregoing, as above indicated the Mediation Board dismissed the application of these redcaps for a bargaining agent of their own choosing, and relegated them to a voiceless minority in a craft or class in which they were not previously and are not now recognized, and designated for them as a bargaining agent a brotherhood to which they cannot belong and in which they have absolutely no voice.

This petition for a reconsideration or rehearing constitutes a final appeal for relief from a judgment by this

Court sustaining an administrative determination that has been and will be used to restrain the exercise by certain railway employees of basic constitutional rights, and is made for the purpose of pointing out additional circumstances and of stressing distinctions between this case and those which were cited by this Court as determinative of the issues involved. In granting certiorari and reversing the judgment of the Court of Appeals of the District of Columbia, this Court without hearing from the respondent appellees gave a per curiam decision on the authority of the four cases hereinbefore referred to, all of which were decided on the 22nd day of November, 1943; which said decision, with apparent lack of concern as to constitutional questions raised, took the position that the courts were without jurisdiction to determine the correctness of the position of the Mediation Board, and that the decision of the Mediation Board was final and conclusive.

It is to be noted that the question of jurisdiction in this case had not been raised by the petitioners seeking certiorari and also it is to be noted that the Mediation Board, the original party to this suit, did not take an appeal from the United States District Court for the District of Columbia to the Court of Appeals for the District of Columbia, and the Government was not a party in interest on this application.

We respectfully submit that the *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees of America* case is not ruled by the four cases referred to in this Court's per curiam decision, nor by any of them. The assumption of jurisdiction by the District Court of the United States for the District of Columbia, and the affirming of that position by the Court of Appeals for the District of Columbia, are as a matter of fact reasonably sustained by language taken from the four cases referred to, from which cases the instant case is distinguishable and the view taken by this Court in those cases does not compel a conclusion that the findings made by the Mediation Board

in the present case are not subject to review by the Federal Courts.

With these distinctions properly drawn a different result than that occasioned by this Court's per curiam decision can be reached without harm to any pronouncements of this Court in any of the cases cited or in any previous case. The instant case, unlike the cases cited, involved not only the question of the validity of the Board's determination as to what constituted the "craft or class", but the far more important and constitutional question as to the right of the petitioners to be protected against an effective and arbitrary denial of *their right to organize and bargain collectively through representatives of their own choosing.* Section 2(4th) Railway Labor Act. The Missouri-Kansas-Texas Railway Company case did not involve the basic right granted by Section 2(4th) of the Act. In that case this Court said:

> "Section 2(4th) states that employees shall have the right to organize and bargain collectively through representatives of their own choosing. But that *great right* which Congress in 1926 at last supported with legal sanctions *is not challenged* here. The Engineers and Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. (64 Sup. Ct. 146, 151.)" (Italics ours.)

The Southern Pacific Company case did not involve a denial of the right to bargain collectively through representatives of their own choosing, as this Court cogently remarks:

> We are concerned only with a problem of representation of employees before the carriers in certain types of grievances which, though affecting individuals present a dispute like the one at issue in the Missouri-Kansas-Texas Railway Co. case. It involves, that is to say, a jurisdictional controversy between two unions * * * For the reasons stated in our opinions in the Missouri-Kansas-Texas Railway Co. case and the

Switchmen's Case, we believe that Congress left so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. (64 Sup. Ct. 142, 145.)

The controversy in the Switchmen's case centered around the authority of the Mediation Board in election disputes to interpret and define the meaning of "craft or class" as used in the Railway Labor Act. It is not denied that the rights granted employees under Section 2(4th) are possibly involved in the issues of the Switchmen's case inasmuch as the right of a majority of any class or craft of employees to choose who shall be the representative of the class or craft is enforced by the powers given the Board under Section 2(9th) to resolve controversies and as an incident thereto to determine what is the appropriate class or craft in which an election should be held. However, the petitioners contend that the said Switchmen's case does not involve the basic issue of the case at bar—the denial of the right to participate in the selection of the bargaining representative.

Petitioners contend that the findings of the Mediation Board in the instant case deprive the petitioners of basic rights under the Railway Labor Act, making the cases referred to either distinguishable, as hereinbefore outlined, or raising the unquestionable issue that the Railway Labor Act itself is unconstitutional if, under its terms, there be a delegation of uncontrolled and uncontrollable authority in the hands of the Mediation Board of fundamental constitutional rights of persons situated as are these petitioners. Under the Railway Labor Act it is clear that the petitioners as employees have the right to organize and bargain collectively through representatives of their own choosing. 45 U. S. C. A., Section 152, 4th. In the case of *Texas & New Orleans Railway Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 569, this Court, through Chief Justice Hughes, stated:

> "Freedom of choice in the selection of representatives on each side of the dispute is the *essential foundation of the statutory scheme.* All proceedings looking to amicable adjustments and to agreements or arbitration of disputes, *the entire policy of the Act,* must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained." (Italics ours.)

Although this Court has cited the *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railway Company* as authority for the reversal of the Court of Appeals for the District of Columbia in the instant case, in that very case this Court, in speaking of the freedom of choice in the selection of representatives, said:

> "* * * What has long been a *'right'* of employees enforceable only by strikes and other methods of industrial warfare emerged as a *'right'* enforceable by judicial decree." (Italics ours.)

In the Switchmen's case before referred to the Court observed that the right of a craft or class of employees to select a bargaining representative is not protected by the Courts, but is protected by the powers granted to the Mediation Board under Section 2(9th) under the Railway Labor Act.

In the Switchmen's case there was no question that all of the employees concerned, those members of the Switchmen's Union as well as those members of the Brotherhood of Railway Trainmen, were doing absolutely the same type of work. In the principal case the Redcaps were doing an entirely different type work from that covered traditionally under the jurisdiction of the Brotherhood of Railway and Steamship Clerks. Nevertheless, without a hearing or any opportunity for the Redcaps to establish the differentiation and without any regard to the consequences that it was linking together a minority with an antagonistic

majority, the Mediation Board issued its fiat, placing the Redcaps under the jurisdiction of the Brotherhood as coming within the same craft or class over which the Brotherhood had jurisdiction. The Board never held an election; never interviewed, or in any wise communicated with a single Redcap whose vested property rights in his job by its decision have been placed at the uncontrolled discretion of the Brotherhood which will not recognize him as a member.

It is respectfully urged that an arbitrary designation by the Mediation Board cannot be substituted for the basic right of free selection entrusted to the care of the Board under Section 2(9th), and we further urge that the effect of the Court's decision in the case at Bar is to thwart the very purpose of the Railway Labor Act, and to rob it of its vitality by sustaining the Mediation Board in a failure and refusal to allow to persons invoking its aid the very rights which the Act was created to insure.

Again as seeming to lay the premise for the distinction between the Switchmen's case and the instant case, this Court in the Switchmen's case has said:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks, 281 U. S. 548, and Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in Section 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'de-

termine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by Section 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. 2d 757; Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. 2d 780. A review by the federal district courts of the board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. *All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.* (Italics ours.)

Can it be denied that in the instant case that if jurisdiction be not allowed to the Federal Courts that there is an attendant sacrifice or obliteration of a right which Congress has created? If the premise be that Congress has the right to determine how the rights which it creates shall be enforced only when all constitutional questions are aside, to use this Switchmen's case as a parallel or a precedent to deny to the Courts the right to review the decision of the Mediation Board in the instant case would be to shut our eyes to the very gist of the present action and to avoid the fundamental issues raised. It is to be noted that the question of the constitutionality of the action of the Board was made a part of the pleadings as well as the proof in the instant case. Quotations from the pleadings will evidence this foundation:

"* * * The plaintiffs also urge that the act and actions of said National Mediation Board herein complained of are not only aribitrary, capricious and unlawful

> under the terms of said Act of Congress, but they do not meet the requirements of due process of law and violate the rights of plaintiffs guaranteed to them by the Constitution of the United States. * * * Plaintiffs aver that the constitutional rights of the plaintiffs in question are violated by the action of the National Mediation Board as herein outlined and specifically, but without limiting the foregoing, the rights as assured them under the Fifth and Fourteenth Amendments to the Constitution of the United States."

Where a constitutional right is invaded it is not necessary for the Congress to bestow a procedural right on any individual or individuals to protect its or their constitutional rights, and if such rights are taken away under the guise of legislation, that legislation is unconstitutional and the only way that those rights may be vindicated is through the courts. We so maintain in this case. It seems thus that the decision in this case decided on August 2, 1943, by the Court of Appeals, makes this so manifest that nothing further on our part should be said, but in view of the Supreme Court's decision we deem it necessary to differentiate this case from those cases relied on by the Supreme Court.

In this connection we invite your attention to Chief Justice Eicher's reasoning in concluding his opinion in affirmation of the lower court:

> "The opinion of this Court in National Federation of Railway Workers v. National Mediation Board, 71 App. D. C. 256, is without bearing on the issue presented to us in the instant case. The coach cleaners there concerned were deprived of no statutory rights, by either the government or their employers. The designated representative, it is true, was a labor organization to which some of the coach cleaners could not belong, but it became the designated representative because a majority of the coach cleaners voted for it and it could continue only so long as they desired it."

It will be noted there that the persons in interest had an opportunity and did take part, and by their majority ex-

pressed their preference for the labor organization other than the National Federation of Railway Workers.

In the instant case the parties in interest unanimously voted for the United Transport Service Employees of America to act as their bargaining agent, but the decision as now reversed by the Supreme Court of the United States would mean that the Brotherhood of Railway & Steamship Clerks should become their bargaining agent, not only without, but in the teeth of this exercise of franchise, and denying due process of law to them as indicated by the decision handed down by Chief Justice Eicher—

> "As we have pointed out, however, the record raises questions of law and fact that deserve better than cavalier disposition by both the administrative and the courts, and the parties are entitled to have them determined in accordance with the due processes of law.
> "The judgment of the District Court is correct and is therefore affirmed."

Should there be any doubt as to these forty-five employees not having their day in court and due process of law also denied to them, reference is had to the concurring opinion of Chief Justice Groner.

Chief Justice Groner, after stating the factual angle of the case, makes this important and further statement:

> "* * * But I think that neither that question nor the question of the precise or exact meaning of the words 'craft or class' and of whom they shall be composed, needs to be decided in this case. And this for the reason that here there is admitted to exist a totally different situation from any contemplated by the Act, and which, so far as I know, is unique. And this grows out of the fact, as we have seen, that the Brotherhood, designnated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in

its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity of classification in accordance with established custom, nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their Spokesman with the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny in many respects analagous to 'taxation without representation.' And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws."

This language in the concurring opinion of Chief Justice Groner so clearly differentiates this case from the cases relied on by the Supreme Court for the overruling of this case that the very statement of it is all that need be said. Couple this with the Supreme Court's decision to the effect that the Statute never intended to take away the rights of

individuals to make their own contracts, and the further statement of Mr. Chief Justice Groner—

> "* * * Individually and as members of that organization they duly requested the Depot Company to enter into a working agreement with United in their behalf, and when this was denied invoked the mediation of the Board. * * *"

This shows, if the ruling of the Supreme Court stands in this case, it not only denies to these forty-five members the right to collectively make their own contract, but it denies to them the individual right to make their own contract, and if Congress passed such a law, clearly the law would be unconstitutional and certain it is that the Mediation Board has no right to do what the Congress is powerless to do, and it is no answer to say that the Court is not passing on the right or wrong of the proposition, but simply the powers of the Board under a Congressional Act. Congress cannot deprive the courts of jurisdiction to review a challenge of the constitutionality of its own act if same deprives an individual of its property without due process of law.

The general scope of the prohibitions of the Fifth Amendment as against the Federal Government is frequently measured by the settled scope of the Fourteenth Amendment. This Court has proceeded on the assumption "that the legal import of the phrase 'due process of law' is the same in both amendments." In *Twining* v. *New Jersey*, 211 U. S. 78, the Court said (p. 101):

> "If any different meaning of the same words as they are used in the Fourteenth Amendment (and in the Fifth Amendment) can be conceived, none has as yet appeared in a judicial decision."

In *Heiner* v. *Donnan*, 285 U. S. 312, the Court said, at page 326:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

The Switchmen's case does not hold that Congress has the power to deny individuals their constitutional rights. On the contrary, this Court has held that Congress cannot abdicate its duty to protect individual rights. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570.

To the extent that there is conceived a "liberty of contract" under the due process clause of the Fourteenth Amendment, a similar "liberty" exists under the Fifth Amendment. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. In *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), citing *Slaughter House Cases*, 16 Wall. 36 (1873), the Court said:

> "While this Court has not attempted to define the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. *Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics ours.)

If the Switchmen's Union case could be used as a precedent or as controlling the instant case, the last act within the framework of the Railway Labor Act by which a minority could have any voice in its rights of pay, rules, or working conditions of employment would be when it casts its vote for the representative to act as its bargaining agent, and if in spite of that vote the Mediation Board can select a representative in the form of a labor union which excludes the minority from membership or any participation in the determination of policy, it would mean the relegating of the parties concerned to a voiceless minority in absolute

conflict with the apparent purpose of the Railway Labor Act.

If again the Mediation Board is to have the last word and subject to no judicial review, attention should be drawn to the fact that there are no standards set up for the representatives' conduct and this absolute lack of procedural safeguards of standards of conduct imposed upon the action of the representative once designated should be contrasted with the procedural safeguards established by Congress for the protection of the majority in the determination of the collective bargaining representative; i. e., certification of dispute, election, secret ballot, and certification to the carrier which the carrier is obligated to exclusively recognize.

Certain it is that Congress cannot and should not have the right of delegation to the Mediation Board of the designating to an unchosen majority of control over the jobs and livelihoods of the minority for same would amount to a constitutional interference with personal liberty and private property, and would be an arbitrary delegation in violation of due process. (It should here be noted that the redcaps would always be a voiceless minority as compared with the total membership of the clerical workers which would mean that the only available relief to them would be to give up their jobs.)

It is inconceivable that Congress, without setting up any standards, has thus put in the Mediation Board an unrestrained and arbitrary power to determine or destroy the working conditions of the minority. Conceding that the Mediation Board has the power to designate (1) craft or class, (2) who shall be the representative of the craft or class, and (3) that the carrier is bound to deal with the representative so designated exclusively, the fact that no standards are established for the conduct of the representative simply means the representative is free to destroy the minority's jobs at will. (Southeastern Carrier Conference agreement with firemen, February 18, 1941, and the Find-

ings of the President's Committee on Fair Employment Practices, November 18, 1943.)

Constitutional rights are individual rights and are not determined by the number of persons involved. *McCabe* v. *Atchison, et al., Railway,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Mitchell* v. *U. S.,* 313 U. S. 80.

It is admitted that the Brotherhood of Railway & Steamship Clerks do not permit colored persons to become members thereof, and the only reason is that of color. It is further admitted that in this case they sought, and were certified as the bargaining agent for forty-five colored people who individually and collectively objected to their representation of them as bargaining agent and who had expressly designated the United Transport Service Employees of America as their choice as a bargaining agent. This is involuntary economic servitude, and we respectfully submit that such is obnoxious to the Thirteenth Amendment to the Constitution as constituting limitations on individual rights which pertain to the status of slaves rather than to free men and the Thirteenth Amendment in its prohibition of slavery is directed to individuals as well as states.

The Thirteenth Amendment:

> Section 1. "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
>
> Section 2. "Congress shall have power to enforce this article by appropriate legislation."

In giving legislative aid to these constitutional provisions Congress enacted in 1866, under the authority of the Thirteenth Amendment, the following sections which were practically re-enacted after the adoption of the Fourteenth Amendment:

"Section 1977: All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce *contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." (Italics ours.)

Mr. Justice Bradley, speaking in the Civil Rights Cases, 109 U. S., page 3, said:

"Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth Amendment was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and no other."

From the foregoing it may be assumed that the power of the National Government by appropriate legislation to protect a right created by, derived from, or dependent in any degree upon, the Constitution of the United States, cannot be disputed. To deprive any person of a privilege inhering in the freedom ordained and established by the Thirteenth Amendment is to dprive him of the privilege inhering in the liberty recognized by the Constitution of the United States. Is the right to *contract* without restraint save by the general law of the land, operating on all alike, a right guaranteed to every citizen under the Thirteenth Amendment of the Constitution?

That answer has been practically had in all the cases in which the Supreme Court has spoken on this question. The decision of the Supreme Court in the above entitled case denies to the people of color the right to make their own contract at the instance of a labor organization certified by the Mediation Board.

It is no sufficient answer for the court to say we are not passing on the right or wrong of this matter. We are simply passing on the powers of the Mediation Board as created by Congress.

As above stated, we maintain that the constitutional right being involved, the Congress did not intend to take away such right, and if so, it was powerless so to do. Mr. Justice Harlan, in his dissenting opinion in *Hodges* v. *U. S.*, 203 U. S. p. 1, 51 L. Ed. p. 66, stated:

> "* * * I have already said that the liberty protected by the 14th Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the 13th Amendment. . . . In Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, we said that such liberty 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment *of all of his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*' All these rights, as this court adjudged in the Allgeyer case, are embraced in the liberty which the 14th Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the 13th Amendment. If, for instance, a person is prevented, because of his race, from living and working where and for whom he will, or from earning his livelihood by any lawful calling that he may elect to pursue, then he is hindered in the exercise of rights and privileges secured to freemen by the Constitution of the United States * * * "

If this unchallengable statement of Mr. Justice Harlan be correct, then unless the Negro worker be given opportunity under the terms of the Railway Labor Act to function in equal manner as all other individuals, the Act itself is unconstitutional and violative of due process of law as vouchsafed in the Fifth Amendment to the Constitution of the United States.

In this connection it is to be noted that the Railway Labor Act not only did not attempt to take away the common law right of individuals to individually contract for themselves, but it sought to add another right—giving them the right to collectively contract with their employers.

If the interpretation of this court stands, both rights are denied to Negroes. It is of no moment whether the constitutional right of Negroes to bargain or make contracts for themselves is taken away directly through the Statute or through the administration of same. Certain it is that the administration of this Statute is not equal when it comes to colored and white employees as applied in this case, and when inequality is designedly produced by Federal Officials in the exercise of their administrative power, the discrimination must meet the same constitutional test as a Statute by which the particular inequality is set forth, and such would be in derogation of the Fifth Amendment as taking property without due process of law.

Whatever the Statute may be upon its face, if the effect of it is to bring about inequality or to take property without due process of law, the courts will travel behind the Statute to see what is its true effect.

Yick Wo v. *Hopkins*. 118 U. S. 356; L. Ed. 30, 220.
Guinn v. U. S., 238 U. S. 347; 59 L. Ed. 1310.
Myers v. *Anderson*, 238 U. S. 368, 59 L. Ed. 1349.

CONCLUSION.

In conclusion we are of the opinion that if this interpretation of the Railway Labor Act prevails the plight of the Negro in the interstate railway labor field is hopeless. Congress has no greater power than the organic instrument under which it derives its existence, and whether we regard

this as a casus omissus or a deliberate attempt to deprive courts of jurisdiction, we submit that in the face of a constitutional issue Congress could not take away jurisdiction of the court, nor can the court abrogate its own jurisdiction and responsibility under the Constitution to protect the individual workers and their constitutional rights against arbitrary administrative action.

For the foregoing reasons the petitioners respectfully urge that a rehearing be granted and that upon further consideration that the order of December 6, 1943, reversing the judgment of the lower court in the above entitled cause be revoked.

Respectfully submitted,

JAMES A. COBB,

GEORGE E. C. HAYES,

CHARLES H. HOUSTON.
Attorneys for Petitioners.

COBB, HOWARD & HAYES,
Attorneys at Law,
613 - F - Street, N. W.,
Washington, D. C.

I, James A. Cobb, of counsel, for the petitioners, United Transport Service Employees of America, et al., do hereby certify that the foregoing petition for rehearing of this cause and for vacating the order reversing the judgment of the lower court is presented in good faith and not for the purpose of delay.

JAMES A. COBB,
Attorney for the Petitioners.

No. 435. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. *v.* UNITED TRANSPORT SERVICE EMPLOYEES ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. December 6, 1943. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338; *General Grievance Committee* v. *General Committee of Adjustment*, 320 U. S. 338; and *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. *Messrs. Frank L. Mulholland, Clarence M. Mulholland,* and *Willard H. McEwen* for petitioners. Reported below: 137 F. 2d 817.